82-1261

No.

In the Supreme Court of the United States

October Term, 1982

STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), permits the National Labor Relations Board (Board) to bypass the secret ballot election process provided in the National Labor Relations Act (Act), and to instead issue bargaining orders "in less extraordinary cases marked by less pervasive practices" without the Board first making a specific analysis of the effectiveness of traditional remedies, the likelihood of recurring employer misconduct, and the residual impact of past employer misconduct on the election process.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Standard-Coosa-Thatcher Carpet Yarn Division, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 691 F.2d 1133, and is reprinted in the Appendix at pages A1-A26.[1] The decision and order of the Board are reported at 257 N.L.R.B. No. 45, and are reprinted in the Appendix at pages A28-A107.

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1. References to the opinions below are designated by "A," followed by the appropriate Appendix page number.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1982. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 23, 1982. (A27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act (Act) (29 U.S.C. § 151 *et seq.*) are as follows:

1. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Section 10(c) of the Act (29 U.S.C. §160(c)) provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

3. Section 10(e) of the Act (29 U.S.C. §160(e)) provides in pertinent part:

> The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.

4. Section 10(f) of the Act (29 U.S.C. § 160(f)) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon

filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

In 1979, the Amalgamated Clothing and Textile Workers Union, AFL-CIO (union) began an organizational campaign at the petitioner's plant in Boaz, Alabama. On March 20, 1979, the union filed a petition for election with the Board, seeking representation of the petitioner's production and maintenance employees. On May 18, 1979, pursuant to a Stipulation for Certification Upon Consent Election, the Board conducted a secret ballot election which the union lost. (A43). The union filed objections to the election, claiming that illegal employer activity during the organizational campaign undermined the union's majority.

The Board concluded that the petitioner had engaged in conduct during the campaign which violated sections 8(a)(1) and 8(a)(3) of the Act, and imposed traditional remedies for these violations. (A35-A37). Based on these same findings, the Board further concluded that the petitioner had violated section 8(a)(5) of the Act, and ordered the petitioner to bargain collectively with the union. (A31-A33). In so doing, the Board justified its imposition of

a bargaining order by a statement which listed the unfair labor practice findings and concluded, "[b]ased on the foregoing, and the entire record in this case, we are persuaded that the Respondent's unlawful activities warrant a bargaining order under *Gissel*." (A33).

On review, the Fourth Circuit Court of Appeals, by a vote of two to one, enforced the Board's order entirely except for a finding of a single section 8(a)(1) violation. (A23).[2] With respect to its enforcement of the bargaining order, the court perfunctorily relied on its obligation to defer to the Board's choice of remedies, and held that the Board's "statement of reasons is sufficient to permit review." (A22-23). The dissenting judge, following the rule in the Fourth Circuit as announced in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979), found that the Board had not supported the issuance of the bargaining order because it had failed to undertake an adequate analysis of the *Gissel* criteria. (A24-26).

The Fourth Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc, with three judges dissenting from the denial of a rehearing en banc, and one judge dissenting from the denial of rehearing. (A27).

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2. Jurisdiction in the court of appeals was based on 29 U.S.C. §§ 160(e) and (f).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's Decision So Far Departs From This Court's Rule In NLRB v. Gissel Packing Co. As To Warrant Review

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court identified three categories of unfair labor practice cases and established that the Board may impose bargaining orders in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process . . . where there is also a showing that at one point the union had a majority." 395 U.S. at 614. Although the Court provided for the imposition of bargaining orders in these so-called Category II cases, it maintained "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," and that in these cases "effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior." *Id.*

Thus, this Court provided in *Gissel* that within the context of the preference for secret ballot elections and the importance of employee free choice, the Board can issue bargaining orders, but the Court's allowance to the Board's discretion in such matters was tempered by the admonition that in the exercise of that discretion the Board:

> can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. *If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the*

> *use of traditional remedes, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.* 395 U.S. at 614-15. (Emphasis supplied).

Thus, the Court defined the scope of the Board's discretion in issuing bargaining orders. The Court counseled that reviewing courts must give "special respect" to the Board's choice of remedies pursuant to these directions by the Court. *Id.* at 612, n. 32.

What the Fourth Circuit has misinterpreted, in its perfunctory deference to the Board's choice of remedies in the instant case, is the scope of the Board's discretion to impose bargaining orders which this Court defined in *Gissel.* Although *Gissel* requires that reviewing courts give special respect to the Board's exercise of discretion in its choice of remedies, *Gissel* defines the scope of that discretion regarding the choice of a bargaining order by setting out what criteria the Board must consider and what findings the Board must make to justify its exercise of discretion to impose a bargaining order. The Fourth Circuit, in this case, has deferred to an exercise of discretion by the Board which *Gissel* did not confer—the discretion to choose a bargaining order without satisfying the *Gissel* requirements. Such deference undermines the integrity of the administrative process and so far departs from this Court's rule in *Gissel* so as to require review by this Court.

The Fourth Circuit's Decision Is In Direct Conflict With The Decisions Of Other Courts Of Appeals

Since this Court's decision in *Gissel,* the courts of appeals have repeatedly demanded that the Board provide an analysis of bargaining order cases according to the *Gissel* criteria in order that the courts could review the

propriety of bargaining orders. But the Board has consistently failed to comply with that direction. As the Seventh Circuit observed,

> even a cursory examination of the decisions applying *Gissel* in this circuit and in other circuits reveals that the Board has declined repeatedly to assist the courts with [its] expertise by revealing reasons for issuing *Gissel* bargaining orders. * * * It is unfortunate that this fundamental question of employee representation should receive so little attention from the Board . . . . *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 508-09 (7th Cir. 1980).

As a consequence of the Board's persistent failure to provide this analysis, some courts of appeals have assumed the obligation of conducting the *Gissel* analysis themselves while other courts of appeals have refused to infringe on the Board's province to decide, based on its expertise, what remedies are appropriate,[3] and have remanded those cases to the Board for findings, often without success. *See, e.g., NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979); *NLRB v. Appletree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982). Other courts have accepted the choice

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3. The question of whether a reviewing court may undertake to provide an analysis of the *Gissel* criteria in reviewing the Board's imposition of a bargaining order is fairly a subsidiary question of the issue presented in this petition, because the courts of appeals which have reviewed bargaining orders in cases in which the Board has not supplied a detailed analysis have generally either buttressed the Board's conclusion with additional analysis or undertaken to review the merits of such cases independently, in accordance with their formulations of the *Gissel* analysis. *See, e.g., Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980). As Judge Garth explained in his dissent in *NLRB v. Eastern Steel Co.*, 671 F.2d 104, 114 (3d Cir. 1982), such *post hoc* rationalizations conflict with the principles of review established by this Court in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

of a bargaining order by the Board and enforced bargaining orders without the benefit of such an analysis, holding that *Gissel* requires deference to the Board's choice of remedies, as the Fourth Circuit did in this case. This conflict points up a recurrent issue in the review of bargaining order cases by the courts of appeals, and the inconsistency among the courts of appeals, and the attendant inconsistency of results in the administration of the Act clearly illustrate the need for a final resolution of the issue. Accordingly, review by this Court is clearly warranted.

The conflict among the courts of appeals is whether the Board must provide an analysis of the *Gissel* criteria in a Category II case, and, if so, what constitutes a sufficient analysis. The Fourth Circuit held in this case that the Board's recitation of the unfair labor practices which it found, combined with the observation that these violations " 'commenced immediately after the Union began the organization drive and continued unabated right up to the election and even after the election' " constituted a sufficient statement of reasons to support a bargaining order under *Gissel* and to permit review of that order. (A22).[4]

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4. The court also provided a brief analysis of its own to buttress the Board's conclusion that a bargaining order was appropriate, relying on the statement of the Second Circuit in *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980), that certain "hallmark violations" are generally recognized " 'to have a lasting inhibitive effect' " on employees, and would generally support the issuance of a bargaining order without extensive explication by the Board, if there were no mitigating factors. (A22-23). The court did not, however, go on to determine whether the Board had analyzed the effect or ascertained the existence of any mitigating circumstances, which it had not, and the court did not do so independently. Thus, the Fourth Circuit's decision in this case sanctions an even greater departure from *Gissel* than other courts have allowed, and therefore presents a compelling issue for review. *See NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094 (7th Cir. 1982). This action by the court raises the subsidiary issue of the province of the reviewing court. *See* note 3, *supra*.

The court held that *Gissel* requires deference to the Board's expertise in fashioning remedies, and deferred to that expertise in enforcing the bargaining order in this case, without requiring that the Board conduct the analysis required by *Gissel*.

Although the factual contexts of bargaining order cases differ widely because of the Board's inconsistency in its explanation and imposition of bargaining orders, the Fourth Circuit's statement of the requirements of *Gissel* is generally consistent with decisions in the Second, Third, Fifth and Eighth Circuits. The Second Circuit, in *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980) and *Coating Products, Inc. v. NLRB*, 648 F.2d 108 (2d Cir. 1981), held that "hallmark violations" can support the issuance of a bargaining order without extensive explication, but the court also cautioned that,

> We believe it important for the Board to give some indication of the reasoning behind its recourse to the extraordinary remedy of a bargaining order, with all its attendant risks. Failure to do so may tend to make routine a remedy that should remain exceptional. We think this should be avoided, and take this occasion to register our concern. 648 F.2d at 109.

The Third Circuit, in *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981), *cert. denied*, ... U.S. ....., 102 S. Ct. 432 (1982), stated that the Board must articulate the factors justifying the choice of a bargaining order over a new election, but held that an extensive list of factors by the administrative law judge was sufficient, without analysis, for this purpose if the "conclusion is inescapable." 657 F.2d at 512. *See NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982). The Fifth Circuit held, in *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 498 (5th Cir. 1980), that general findings by the Board do

not require setting aside a bargaining order where "the record substantially supports the Board's conclusions." *See Chromalloy American Corp. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *but see NLRB v. American Cable Systems, Inc.*, 414 F.2d 661 (5th Cir. 1969), and *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). Finally, in *NLRB v. Ely's Foods, Inc.*, 656 F.2d 290, 293 (8th Cir. 1981), the Eighth Circuit enforced a bargaining order without detailed findings by the Board. *But see Patsy Bee, Inc. v. NLRB*, 654 F.2d 515, 518 (8th Cir. 1981).

These decisions, which generally accord with the Fourth Circuit's rule in this case, are directly inconsistent with decisions in the First, Sixth, Seventh, Ninth, and Tenth Circuits, which have interpreted *Gissel* as requiring the Board to analyze and articulate the appropriateness of a bargaining order. The First Circuit, in *NLRB v. The American Spring Bed Mfg. Co.*,[5] 670 F.2d 1236, 1247 (1st Cir. 1982), held that, notwithstanding the Board's expertise in fashioning remedies, a bargaining order was unenforceable unless the Board specifically articulated

> precise reasons for concluding that: 1) the employer's unfair labor practices so undermined the union's majority that conducting a fair election would be unlikely; 2) the employer's unlawful conduct was likely to continue; and 3) the ordinary remedies of backpay, reinstatement and posting of notices would be inadequate to ensure a fair election.

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5. The unfair labor practices in *American Spring Bed*, in which the court refused to enforce the Board's bargaining order, 670 F.2d at 1249, were more serious and substantial than those found in this case, pointing up the unexplainable inconsistency of results in the administration of the Act resulting from the conflict among the courts.

See NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1979). The Sixth Circuit, in *United Services for Handicapped v. NLRB*, 678 F.2d 661, 664-65 (6th Cir. 1982), held that the court's usual deference to Board findings is lessened in bargaining order cases, and that bargaining orders would not be enforced where the Board made no detailed findings. *See NLRB v. Gibraltar Industries, Inc.*, 653 F.2d 1091 (6th Cir. 1981); *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280 (6th Cir. 1981); *NLRB v. Rexair, Inc.*, 646 F.2d 249 (6th Cir. 1981); *Donn Products, Inc. v. NLRB*, 613 F.2d 162 (6th Cir.), *cert. denied*, 447 U.S. 906 (1980).

In *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d at 1094, the Seventh Circuit held that the Board must make specific findings to support a bargaining order, and that "'[t]o be an unfair labor practice . . . conduct need not have as demonstrably severe an impact on employee rights as conduct requiring a bargaining order.'" *See Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *but see NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982). The Ninth Circuit, in *NLRB v. Davis*, 642 F.2d 350, 354 (9th Cir. 1981), held that the Board must make explicit, not perfunctory, findings to support a bargaining order, and that *Gissel* requires deference only upon such findings. *See NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148 (9th Cir. 1977). The Tenth Circuit, in *NLRB v. Miller Trucking Service, Inc.*, 445 F.2d 927, 931-32 (10th Cir. 1971), held that *Gissel* requires specific findings, not generalizations, to support a bargaining order. *See NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981).

In addition to the conflicts among the courts of appeals on this issue, as the dissenting judge in this case

pointed out, the decision in this case inexplicably conflicts directly with precedent in the Fourth Circuit on the same issue. (A25). In *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d at 996-97, the Fourth Circuit held that the Board cannot support a bargaining order with a recitation of pervasive and egregious unfair labor practices; rather the Board must make a "specific and detailed" analysis of the immediate and residual impact of the unfair labor practices on the election process, the likelihood of recurrence of such practices, and the potential effect of ordinary remedies. The court further held that "it is the impact of the violations . . . and not the violations *per se* that is important" to the bargaining order issue. *Id.* at 999. The Fourth Circuit reiterated this rule in *NLRB v. Appletree Chevrolet, Inc.*, 671 F.2d 838, 841 (4th Cir. 1982), in which it held that the Board must "make findings sufficient to establish . . . the continuing effects of the employer's misconduct and the ineffectiveness of the usual remedies. . . ." *Accord, J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 772 (4th Cir.), *vacated on other grounds*, ... U.S. ....., 102 S. Ct. 2112 (1982). In this case, the majority neither distinguished the *Appletree Chevrolet* cases nor overruled them; indeed, the majority opinion made no reference to those cases with respect to the bargaining order issue. The dissenting opinion, however, clearly points out that the instant case cannot be distinguished from the *Appletree Chevrolet* cases. (A25).

Not only is the decision in this case directly inconsistent with prior cases in the Fourth Circuit, but it is also directly inconsistent with a case in this same circuit published two months after this case. In *NLRB v. Maidsville Coal Company, Inc.*, ... F.2d ....., 111 LRRM 2888, 2891 (4th Cir. Nov. 15, 1982), the Fourth Circuit, citing *Appletree Chevrolet*, refused to enforce a bargaining order

because the Board failed to make specific findings, and characterized the Board's conclusory statement of reasons as a "talismanic invocation," which, "of course, [is] insufficient in this Circuit to sustain a bargaining order." The Court remanded the case to the Board for reconsideration in light of *Appletree Chevrolet*, and "further admonish[ed] the Board to consider our additional comments on the necessary analysis in Appletree II." (citation omitted) *Id.* at 2891 n. 5.[6] The *Maidsville Coal* opinion was authored by Judge Bryan, who dissented from the opinion in the instant case, following the rule of the *Appletree Chevrolet* cases. Thus, the different results in these cases clearly show that the administration of the Act can depend on the panel reviewing a Board decision, and this inconsistency and confusion within circuits illustrates the need for guidance.[7]

The stark inconsistency among the courts of appeals in the interpretation and application of *Gissel* presents a serious question about the administration of the Act by the Board and the courts, and not a mere semantical issue. The result of this inconsistent treatment of the issue is the creation of an unstructured, unreasoned body of precedent which confounds the development of labor law and inflicts very real practical consequences and inequities on employers and employees. Review by this Court is critical to a resolution of this issue.

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6. The Board has petitioned for a rehearing in *Maidsville Coal*, citing as the basis for its petition the irreconcilable conflict between the decision in that case and the decision in the instant case. Petition for Rehearing, and Suggestion for Rehearing In Banc at 1, *NLRB v. Maidsville Coal Company, Inc.*, No. 81-2155 (4th Cir. Nov. 26, 1982).

7. The Fourth Circuit is not the only circuit to show the effects of this inconsistency and confusion. The Third Circuit has repeatedly attempted to address the issue, but has had little success. *See NLRB v. Eastern Steel Co.*, 671 F.2d at 111 (Adams, J., concurring).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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No. 81-1673

Standard-Coosa-Thatcher Carpet Yarn Division, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Amalgamated Clothing and Textile Workers Union,
AFL-CIO, CLC,
Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued March 30, 1982 Decided September 20, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit Judge, and HALL, Circuit Judge.

Homer L. Deakins, Jr. (Ogletree, Deakins, Nash, Smoak and Stewart on brief) for Petitioner; Richard Michael Fischl (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel on brief) for Respondent; Bar-

bara Jane Carey, Assistant General Counsel (Arthur M. Goldberg, General Counsel, George A. Kirschenbaum, Associate General Counsel on brief) for Intervenor Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC.

WINTER, Chief Judge:

In February 1979, the Amalgamated Clothing and Textile Workers Union (the Union) began a campaign to organize a plant of the Standard-Coosa-Thatcher Carpet Yarn Division, Inc. (the Company) in Boaz, Alabama.[1] The Union had lost a previous election in the plant in December 1977. By March 21, 1979, however, eighty-seven of the 147 bargaining-unit employees had signed cards designating the Union as their exclusive bargaining representative. The Union therefore filed a petition for a representation election and made a bargaining demand on the Company, which was refused. The Board conducted an election on May 18, 1979, and the Union lost by a vote of 67 to 74.

On July 29, 1981, the Board adopted, as modified, an administrative law judge's determination that the Company committed various unfair labor practices in connection with the 1979 campaign. The Board's order not only required the Company to cease and desist from such practices and to reinstate a discharged employee, but also directed the Company to bargain with the Union upon request. The Company petitions for review of the Board's order, and the Board cross-petitions for enforcement. We grant enforcement.

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1. Jurisdiction is invoked under 29 U.S.C. § 160(f)(1976) on the grounds that the Company transacts business within this circuit.

I.

The Board found numerous violations of § 8(a)(1) of the National Labor Relations Act as amended (NLRA), 29 U.S.C. § 158(a)(1) (1976). For purposes of this discussion, the asserted violations will be grouped according to the Company personnel involved.

A. *Statements by Plant Manager Bowman*

On the morning of the election, employee Kathy Holland engaged plant manager Jack Bowman in a conversation about unionization. Holland volunteered that she had read the Company's contract covering unionized employees at another plant and found nothing in its terms of benefit to employees. Bowman responded that that contract was the first thing the Company's lawyers would insist on if the Union won the election.

The Board found that Bowman's response was a threat that the Company would not bargain in good faith if the Union were victorious. Noting that the conversation took place just hours before the voting, the Board concluded that Bowman's threat of insistence on contractual terms he knew Holland found unpalatable coerced Holland in the exercise of rights guaranteed by § 7 of the NLRA, including the right to exercise the franchise free of intimidation.

The Company insists that this finding puts the Board in the impermissible posture of judging contractual terms. The argument is unpersuasive, however, for the Board focused, not on particular contractual terms, but rather on the possible effect of Bowman's statement. We have previously held that such statements as "a union would do employees no good" may be unlawfully coercive in some circumstances. NLRB v. McCormick Concrete Co., 371 F.2d 149, 152 (4 Cir. 1967). Here, the fact that the statement

was made on the brink of the election to one who saw no benefit in the contract is substantial evidence supporting a finding of coercion. *See* Procter & Gamble Manufacturing Co. v. NLRB, 658 F.2d 968, 984 (4 Cir. 1981); Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 145-46 (1 Cir. 1981); Daniel Construction Co. v. NLRB, 341 F.2d 805, 811 (4 Cir.) (whether an employer's remarks are coercive "is a question essentially for the specialized experience of the NLRB"), *cert. denied*, 382 U.S. 831 (1965).

B. *Statement by Personnel Manager Bouldin*

In mid-February,[2] employee Patricia Whisenant remarked to personnel manager Ernest Bouldin that employee Holland was engaged in "Union business." According to Whisenant's testimony, which was credited by the administrative law judge, Bouldin replied that if Holland "don't watch it she's going to get her ass fired."

The Board properly concluded that this threat of discharge for union activity was coercive. *See, e.g.*, NLRB v. Aerovox Corp., 435 F.2d 1208, 1210 (4 Cir. 1970). The Company's sole objection is that this violation was not alleged in the complaint. At the administrative hearing, however, the General Counsel moved to amend the complaint, and the motion was granted.

In mid-March, Bouldin advised Whisenant that she would not be given a job she had applied for. Whisenant lost her composure and told Bouldin, "You just hate me." Bouldin answered that he would like her a lot better if she were on the right side.

The Board characterized Bouldin's reply as an invitation to abandon the Union in order to obtain the benefits

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2. Unless otherwise indicated, all dates refer to the year 1979.

of an improved relationship with management and held that it violated § 8(a)(1).[3] The Company argues that there is no substantial evidence of coercion since it was known to Whisenant that, under established procedures, the job in question would go to the most senior applicant. Bouldin's remark, however, can be fairly understood as implying that management would confer advantages on anti-union employees. Coming from the senior personnel officer at the plant, such a comment can reasonably be deemed coercive.

On the day before the election, Whisenant went up to Bouldin and told him she was sorry to be working against him in the campaign but that she "would be on the gates [for the Union] the next morning." Bouldin asked, "Pat, what has this company done to you? What have you got against this company?" Whisenant answered, "Nothing." Bouldin persisted, asking Whisenant again why she was working for the Union. She responded, "[I]t was something I believed in." The Board concluded that Bouldin engaged in "coercive interrogation" by "probing into Whisenant's motives for supporting the Union."

Employers are free to ask employees about their sentiments regarding a union provided the questioning is not coercive. The test of coerciveness " 'is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the

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3. The General Counsel alleged that Bouldin threatened Whisenant with a loss of benefits, whereas the Board found that he enticed her with a vague promise of benefits. On either view, the benefits were contingent upon her opposing the Union. The Company's argument that the finding varied fatally from the complaint is without merit, since the Company had ample notice that a § 8(a)(1) violation was alleged as to the particular conversation at issue and the matter was fully litigated by the parties. *See* NLRB v. Klaue, 523 F.2d 410, 414-15 (9 Cir. 1975); NLRB v. Tamper, Inc., 522 F.2d 781, 790 (4 Cir. 1975).

totality of the circumstances to intimidate.'" NLRB v. P.B. & S. Chemical Co., 567 F.2d 1263, 1267 (4 Cir. 1977) (quoting Corrie Corp. v. NLRB, 375 F.2d 149, 153 (4 Cir. 1967)). Here, the fact that Whisenant initiated the conversation, unhesitatingly volunteered her pro-union sentiment, and stuck by her position under questioning militates against the finding of coerciveness. But Bouldin's senior position, his repeated questions, and the fact that he was speaking on the eve of the election reasonably support the Board's determination. Because the Board's finding is supported by substantial evidence, it must be sustained.

C. *Statements by Supervisor Lowery*

On May 12, employee Betty Underwood (a Union activist) and other employees protested to plant manager Bowman that their paychecks for the night shift were too low by $2.00. Bowman explained that there had been a computer error and promised to rectify the matter. Supervisor Frank Lowery later approached Underwood at her work station and inquired about the problem. Underwood asserted that the Company had deliberately shortchanged the night-shift employees. According to Underwood's credited testimony, the following conversation ensued:

> Frank said, just raise hell, Betty, said if you'll notice Dennis Williams raised hell for a couple of weeks, and he's not here any longer.[4]
>
> And I said, Frank, if that's a threat, I won't be as easy to get rid of as Dennis was. And he said if you'll notice this is a one-on-one conversation, and I'll keep

4. Dennis Williams had been discharged about a week before this exchange transpired. As discussed later, the Board found that Williams was fired in retaliation for his support of the Union.

> it that way. My word's as good as yours, and I told him we'd let the government decide whose word was best.

The Board found that Lowery threatened Underwood with discharge for engaging in protected concerted activity.[5] The Company maintains that Underwood was not participating in concerted activity when she spoke with Lowery and that her accusation that the Company had cheated night-shift employees was patently false and therefore not protected. These contentions are unpersuasive. Lowery's statement was a thinly veiled warning that further activities like Underwood's protest to management would result in her dismissal. That protest was clearly concerted activity; the truth or falsity of Underwood's views does not deprive such activity of its protection.

On March 5, Lowery issued Underwood a verbal warning for dropping "hard waste" on the plant floor in violation of Company rules. According to Underwood, Lowery

> told me that he wanted to break me from a bad habit while the Union was in town. He said that he knew I was in a Union campaign, and that at this time I'd do nothing to break a rule. And so he was going to break me from a bad habit while they were in town.

Crediting Underwood's testimony, the Board found that Lowery's warning to Underwood was "an implied threat . . . of reprisals for union activity."

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5. The Company argues that this finding violates due process because the complaint alleged retaliation for union activities rather than for protected concerted activities. This argument is frivolous. The Company had fair notice of the episode alleged to be coercive, and the matter was fully litigated. *See generally* note 3 *supra*. Whether the concerted activity which provoked the threat was related or unrelated to the Union has no bearing on whether there was a § 8(a)(1) violation.

If the Board had found that the disciplinary warning issued to Underwood was discriminatory and hence violated § 8(a)(3), we would probably be constrained to set it aside. An employer who disciplines an employee for violation of a valid rule commits no § 8(a)(3) violation absent a showing that the discipline was in fact motivated by a desire to penalize union activity. The charge made here, though, is not that the discipline imposed was discriminatory and proscribed by § 8(a)(3), but rather that the specific form of the warning was coercive in violation of § 8(a)(1). We therefore have no occasion to inquire whether the ostensible reason for its issuance was actually a pretext.[6] Instead, we need only decide whether the words by which the warning was conveyed could be found to have tended to coerce an employee in the exercise of her § 7 rights.

In answering that question, we are hindered, as was the administrative law judge, by inconsistent evidence concerning the words Lowery employed in giving the warning. Lowery's testimony of the pertinent conversation included no reference to union activities. In weighing Lowery's testimony against Underwood's, the administrative law judge was frank to admit that demeanor evidence supplied no clue as to which witness's version of events was closer to the truth. He credited Underwood's testimony, however, partly on the ground that she made herself vulnerable by testifying while still under Lowery's supervision. We reject this reasoning, for the mere fact that an employee exposes himself to retaliation by testifying against his employer has little bearing on credibility. L. S. Ayres & Co. v. NLRB, 551 F.2d 586, 588 (4 Cir. 1977).

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6. Other charges in this case do raise the issue of discriminatory and pretextual discipline. They are treated in Section II *infra*.

Nevertheless, the record adequately supports the administrative law judge's credibility determination. Lowery took the stand but never denied having mentioned the Union in his warning to Underwood. His silence on this question, in the face of Underwood's specific allegation, fairly gives rise to an adverse inference.

Accepting the administrative law judge's findings of fact, we unhesitatingly affirm his conclusion that Lowery's warning to Underwood violated § 8(a)(1). In the version credited by the administrative law judge, Lowery's warning had a clear tendency to coerce by implying that the Union's presence in the plant would lead to unusually strict enforcement of the rules. Discipline which would otherwise be valid becomes an unfair labor practice under § 8(a)(1) when accompanied by statements tending to intimidate union activities unrelated to any disciplinary infraction.

Employee Elizabeth Sharp testified that Lowery engaged her in the following conversation on an unspecified date in May:

> Mr. Lowery . . . walked on my job and said, Liz, says I know you're friends with Betty Underwood, but said I think you're on my side. I said, Frank, I don't know what you're talking about. He said, Liz, you know what I'm talking about and said I still think you are on my side.
>
> I said, Frank, what are you talking about? And he turned around and walked off.

The Board found that Lowery subjected Sharp to unlawful interrogation. Noting that Underwood was a prominent supporter of the Union and that Lowery's comments were provoked by no apparent good reason, the Board

characterized his "enigmatic statement" as "an effort to elicit a statement from Sharp as to whether she was for or against the Union."

The Company argues that no reasonable inference of coercion can be drawn from Lowery's exchange with Sharp. Indeed, Lowery's relatively junior position and his apparent lack of success in eliciting information weigh against a finding of coercion. But the obliqueness of Lowery's approach can reasonably be deemed to have a tendency to intimidate. Such a tendency is heightened by the fact that the approach was in the midst of an acrimonious campaign, just a few weeks before the representation election. *See generally* Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1022 (4 Cir. 1981). Given the absence of any apparent legitimate reason for Lowery's conduct, the Board's conclusion should stand.

On February 25, Lowery called employee Melinda Kennedy to his office and asked whether she had signed a union card and, if so, whether she knew what it meant. In the ensuing conversation, Lowery volunteered that "if the Union did come in . . . we would not get paid any more than what we were getting paid now because the Company would only pay so much." On the basis of these fact, the Board found not only coercive interrogation but also interference with § 7 rights by means of a representation of Company intransigence on the matter of wages.

That Lowery questioned Kennedy in his office, rather than at her workplace, may suggest coerciveness. *See, id.*; NLRB v. Lexington Chair Co., 361 F.2d 283, 289 (4 Cir. 1966). Cutting in the opposite direction is the fact that Kennedy displayed little reluctance to discuss the pros and cons of unionization with Lowery. It is the tendency of Lowery's conduct, however, rather than its actual effect, which is dispositive. *See* NLRB v. P.B.

& S. Chemical Co., 567 F.2d at 1267. The Board's findings respecting interrogation and threatened intransigence are not unreasonable and should therefore be accepted.

On March 17, employee Rebecca Stephenson asked Lowery for permission to take some time off from work. Lowery said he would grant the request since he knew she had not signed a union card. Not wishing to be compromised, Stephenson told him she had indeed signed a card. Lowery responded that she could take time off whether or not she had signed a card.

The Board concluded that Lowery's comments were intended to elicit information about Stephenson's attitude toward the Union and were therefore an indirect form of prohibited interrogation. The Board further found, however, that any threat of reprisal or promise of benefit implicit in his comments was dispelled by his subsequent promise to disregard Stephenson's union sympathies in considering her request for leave.

These findings seem flatly inconsistent with one another. Interrogation violates § 8(a)(1) only if it tends to coerce. *See* NLRB v. P.B. & S. Chemical Co., 567 F.2d at 1267. Here the Board specifically found that Lowery immediately dispelled any threatening aspect of his statement. Furthermore, that finding rejected on the merits the General Counsel's sole allegation concerning the Lowery's Stephenson conversation—namely, that it constituted an unlawful threat of reprisal. The General Counsel specifically disavowed an interrogation theory at the hearing, and the Board was not entitled to charge a violation that was not pressed upon it by the complaining party. *See* NLRB v. Tamper, Inc., 522 F.2d 781, 789-90 (4 Cir. 1975); *see also* note 3 *supra*. It follows that this finding must be set aside.

D. *Statements by Supervisor Harris*

On February 13, supervisor Bennie Harris took Kathy Holland from her work station to the nurse's office, locked the door, and asked Holland why she wanted a union. When she responded that a union would protect workers' seniority rights, Harris countered that "we'll all be out of a job if you get this Union . . . [since the Company] will close down Boaz and use it for a warehouse." When Holland disputed the point, Harris insisted that he had "seen it in black and white, and I'm concerned with my job—with losing my job, too."

The Board found that Harris engaged in coercive threats and interrogation. Although the Company argues that Holland was not personally intimidated, such questioning behind locked doors and of predictions of plant closure by a supervisor who claims to be reliably informed have an obvious tendency to coerce.

In mid-February, Harris called Patricia Whisenant into his office, locked the door, and asked her why she had signed a union card. Harris told Whisenant that, if the Union won the election, she could no longer deal with management in person but would have to speak through a Union steward. He also stated that the Company would close the plant if the employees voted the Union in.

The Board found that Harris interrogated Whisenant and threatened her with plant closure and loss of access to management, all in violation of § 8(a)(1).[7] The Com-

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7. The Company insists that the Board erred in finding interrogation as well as threats, since the General Counsel alleged only threats. Clearly, though, the Company had adequate notice that a § 8(a)(1) violation was alleged as to the particular conversation at issue. With respect to this episode, the general counsel did not disavow an interrogation theory at the hearing. On the contrary, the issue was fully litigated by the parties. *See* note 3 *supra*.

pany argues that the conduct in question was not coercive, since management was free to point out the recognized fact that unionized employees ordinarily deal with their employers indirectly through union representatives. *See* NLRB v. Sacramento Clinical Laboratory, Inc., 623 F.2d 110, 112 (9 Cir. 1980). Even truthful comments by a supervisor, however, may be impermissible in circumstances tending coercively to discourage unionization. *See id.* That Harris's interview with Lowery was coercive sufficiently appears from the fact that it was conducted surreptitiously in a locked room.

On the day after the election, Harris walked up to Whisenant and asked, "Pat, where is your god-damn Union[?]" To her comment that the Union would challenge the election in court, Harris replied: "[Y]ou're not satisfied getting in as deep as you have. You just go on and get in deeper and deeper." The Board reasonably concluded—and the Company apparently does not contest—that Harris violated § 8(a)(1) by "statements clearly calculated to make Whisenant fearful of [the Company's] reaction to her protected union activities."

E. *Interview by Attorney Perrin*

In January 1980, Company counsel, Martha C. Perrin, questioned approximately seventy employees about their union cards. The information thereby gleaned was to be used in the administrative hearing on the Union's unfair-labor-practice charges. The interviews took place in private in the first-aid room of the plant. Perrin's usual practice was to introduce herself as a Company attorney who, in preparation for a hearing, wished to speak to the employee regarding his authorization card. She conveyed this information by reading a prepared statement which

made clear that the employee could refuse to cooperate and would face no reprisals.

The administrative law judge found that Perrin failed to read the prepared statement or recite the usual safeguards when she interviewed employee Willis Langston. Upon questioning, Langston readily stated that he had signed a card and understood its contents.

By omitting assurances against reprisals, Perrin failed to comply fully with the safeguards required by Johnnie's Poultry Co., 146 N.L.R.B. 770 (1964), *enforcement denied*, 344 F.2d 617 (8 Cir. 1965).[8] The administrative law judge noted that Perrin failed to recite the assurances only once in more than seventy interviews, and he considered it a fair inference that Langston had previous knowledge of the policy against reprisals based on conversations with other employees whom Perrin had interviewed. Finding the "coercive impact" of the Langston interview to be slight at most, the administrative law judge ruled that Perrin's inadvertent deviation from the *Johnnie's Poultry* standards did not constitute an unfair labor practice.

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8. The Board in *Johnnie's Poultry* held:

> In allowing an employer the privilege of ascertaining the necessary facts from employees in [preparation for litigation], the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

146 N.L.R.B. at 775 (footnote omitted).

The Board rejected the administrative law judge's conclusion. It held instead:

> Compliance with *Johnnie's Poultry* safeguards is the minimum required to dispel the potential for coercion in circumstances where an employee is interrogated concerning his intended testimony before the Board. The effect of the Administrative Law Judge's decision here is to substitute a different standard.

The Board, in effect, ruled that failure to observe the *Johnnie's Poultry* standards is a per se violation of § 8(a)(1). Arguably, the statute would be better served by raising a rebuttable presumption of coerciveness in such cases—a presumption which the Company rebutted to the satisfaction of the administrative law judge in this case. Here, too, though, it is the tendency of an employers' words and conduct, rather than their actual impact, which is controlling. The Board's per se rule simply recognizes that a significant risk of coerciveness arises when an employer questions employees about a union without informing them that they may, with impunity, decline to respond. The requirements of *Johnnie's Poultry* are reasonably calculated to limit that risk and do not unreasonably restrict an employer's interest in gathering information for use in Board hearings. Because the Board's rule is consistent with the governing legal standard and does not constitute an abuse of discretion, we have no grounds to set aside findings derived from applying it.

II.

We turn now to alleged violations of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976).

A. *Discriminatory Enforcement of Plant Regulations*

The Board held that the Company violated § 8(a)(3) by enforcing a plant rule in a manner calculated to discourage Union activities among its employees. The rule in question prohibits employees from leaving their work areas or the plant without authorization.

We have long held that an employer's enforcement of a valid disciplinary rule does not constitute an unfair labor practice absent an " 'affirmative and persuasive' " showing that enforcement was motivated by a desire to discourage union activity rather than by supportable cause. Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4 Cir. 1976) (quoting NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1 Cir. 1968); *see* NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 993 (4 Cir. 1979). Where the evidence suggests both proper and improper motives for a challenged disciplinary action, we have given the employer the benefit of a presumption so as to prevent pro-union employees from insulating themselves from discipline for cause. *See, e.g.*, Procter & Gamble Manufacturing Co. v. NLRB, 658 F.2d 968, 980 (4 Cir. 1981); NLRB v. Burns Motor Freight, Inc., 635 F.2d 312, 314 (4 Cir. 1980) (per curiam). But the General Counsel may, of course, rebut that presumption by showing that discipline would not have been applied, or would have been less stringent, in the absence of union activities. *See* American Thread Co. v. NLRB, 631 F.2d 316, 320-23 (4 Cir. 1980).

The evidence in this case indicates that, during the Union's initial campaign in 1977, plant manager Bowman told employee Donna McWhorter that the Company was attempting to stop Union activists from roaming around to collect employee signatures, and that it therefore looked bad to permit opponents of the Union to move freely about

the plant. In March 1979, supervisor Harris issued Union activist Patricia Whisenant a warning against leaving the department. Although Whisenant had committed no violation, Harris indicated he wished to prevent her from later claiming she had not been warned. In February and March 1979, supervisor King told two employees that they could no longer leave the department without permission. The employees testified that they had previously been free to leave the department without permission and without fear of discipline. Dennis Williams received written warnings for unauthorized absences in March and April 1979, and Gloria Stanfield received a warning in May 1979.

The administrative law judge, whose findings were adopted by the Board, weighed the evidence as follows:

> Between November 1977, 1 month before a Board-conducted election, and February 9, 1979, the date the present union campaign began, the only proven warnings given for infractions of the rule were [issued on] December 11, 1978 and February 2, 1979. It is highly improbable that all 147 employees religiously abided by the rule during this 13-month period, and there is credible employee testimony that they did not. Bill King's advice to Bobby Joe King that they could no longer leave without permission signaled a change to more rigid enforcement, and Harris' prospective warning to Whisenant emphasized a new insistence on strict compliance with the rule. No persuasive reason was proffered for this more stringent policing of rule violations, and the reasons for the 1977 enforcement stated by Bowman to McWhorter, combined with the timing of the statements of Bill King and Harris shortly after the commencement of the new campaign, leads me to the

conclusion that the emphasis on enforcement after the campaign started was prompted by the new campaign and was designed, as in 1977, to impede the acquisition of signed authorization cards.

In our view, the record amply and persuasively supports the Board's conclusion that the Company enforced the unauthorized-absence rule more intensively during the Union campaigns than at other times, and that it did so for the purpose of impeding unionization. The Company notes that two employees received warnings for unauthorized absences during the interval between the two campaigns. This scarcely undermines the evidentiary basis of the Board's finding, however, since those two warnings were for leaving the plant, not merely the assigned work areas within the plant. Hence, they do not cast doubt on the testimony indicating that employees were usually free-except during Union campaigns—to move among the various departments within the plant. Furthermore, isolated enforcement between Union campaigns is not inconsistent with intensified enforcement during the campaigns. Nor is it fatal to the Board's finding that the rule was enforced equally against pro- and anti-union employees during the campaign. As the Board emphasized, blanket enforcement would have been the most effective means of hampering the Union's card campaign.

In sum, the Board's conclusion that the unauthorized absence rule would not have been rigorously enforced but for union activities is soundly based on the evidence.[9] It

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9. This conclusion obtains whether the ultimate burden of proof is placed on the General Counsel or instead on the Company. We therefore find it unnecessary to accept or reject the test adopted by the Board in Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1 Cir. 1981), *cert. denied*, ... U.S. ..... (1982), whereby the burden of proof shifts to the employer once the General Counsel makes out a prima facie case.

follows that the Company violated § 8(a)(3) by using an otherwise valid rule as a weapon for discouraging unionization. *See* American Thread Co. v. NLRB, 631 F.2d at 320, *cf.* NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1049 (5 Cir. 1979) (a tightened enforcement policy is invalid if imposed with discriminatory intent).

B. *The Discharge of Dennis Williams*

Dennis Williams received warnings for leaving his work place and going to other parts of the plant on March 29 and April 9, 1979. On April 25, he received a warning for being outside the mill without permission, leaving trash at his work place, failing to clean his machine, and failing for two days to punch his timecard. On May 7, Williams was again warned for failure to punch his timecard. He was then dismissed pursuant to the Company's usual policy of terminating employees who receive four warnings.

The Board found that the Company had "strain[ed] to terminate Williams" because of his support of the Union. The Board held, in particular, that the first two warnings violated § 8(a)(3) since they reflected the anti-union policy behind strict enforcement of the unauthorized-absence rule. As to the third warning, involving the incident in which Williams was caught outside the plant during his shift, the Board found that the Company had treated Williams more harshly than a nonunion employee who was caught with him but received no warning. The Board concluded: "The General Counsel has set forth a *prima facie* case, which [the Company] has not convincingly rebutted, that the entire sequence of warnings was consciously designed to remove a union adherent from the payroll."

The Company raises several arguments against the Board's conclusion. First, it attacks the assumption that

enforcement of the unauthorized absence rule was invalid. Since we have ruled against the Company on this point in Section IIA above, there is no reason to review it here. Second, the Company contends there is no evidence that it had knowledge of Williams's pro-union sentiments when it issued the first two warnings. As the Board found, however, the Company had reason to infer Williams's sympathies at least as early as the date of the second warning, when Lowery observed Williams conversing with Union activist Underwood. Even absent such knowledge, moreover, enforcement of the unauthorized-absence rule was unlawful if intended to discourage unionization. *See* Dillingham Marine & Manufacturing Co. v. NLRB, 610 F.2d 319, 321 (5 Cir. 1980). Finally, the Company argues that there is no substantial evidence of discriminatory enforcement with respect to Williams's third warning. Both Williams's credited testimony and the documentary evidence of the warning, however, fully support the Board's finding that the Company discriminated impermissibly when it punished Williams but not his co-offender. *See* American Thread Co. v. NLRB, 631 F.2d at 322.

Thus, the General Counsel made a persuasive showing that Williams would not have been discharged but for the Company's desire to forestall unionization. Under Company policy, it takes four warnings to justify a discharge. Because three of Williams's warnings were based on an anti-union enforcement policy regarding the unauthorized absence rule, his discharge clearly violated § 8(a)(3).[10]

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10. Here, too, the General Counsel's showing is sufficiently strong that we need not decide whether the ultimate burden of proof shifted to the Company. *See* note 9 *supra*.

C. *The Bargaining Order*

We come now to the final issue in the case: whether the Board erred in ruling that the Company violated § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1976), and in ordering the Company to recognize and bargain with the Union, even though the Union has yet to win a representation election in the relevant bargaining unit.

It seems clear that the Company's unfair labor practices were not so persuasive and outrageous that a bargaining order would be justified even absent a showing that the Union achieved a card majority. Rather, the question is whether the employees, having given the Union a card majority during the campaign, have been deprived of a fair election and of a reasonable likelihood that a fair election could be held in the future. As the Court observed in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969):

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Id. at 614-15.

The Company raises essentially two arguments against the appropriateness of a *Gissel* bargaining order: first, that the Board failed to make sufficiently detailed findings concerning the impact of the Company's unfair labor practices on the election process; and second, that the evidence does not indicate that a fair election cannot now be held.

The Board's inconsistency in granting or withholding bargaining orders in apparently similar cases has caused

concern among the courts of appeals, which have admonished the Board to articulate more precisely the controlling standards and factual distinctions. *See, e.g.*, NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 215 (2 Cir. 1980). Ultimately, however, the choice of remedies is for the Board, provided that the choice made does not rest on insubstantial evidence or erroneous legal standards and does not constitute an abuse of discretion. *See* NLRB v. Gissel Packing Co., 395 U.S. at 612 n.32. To facilitate review under those standards, the Board must support a *Gissel* order by a statement of reasons stating what unfair labor practices the order is intended to redress and indicating in general why traditional remedies are inadequate in the circumstances. *See* Justak Bros. & Co. v. NLRB, 664 F.2d 1074, 1081-82 (7 Cir. 1981). In this case the Board discussed the particular violations involved and emphasized that "the serious and extensive unlawful activities by the [Company] commenced immediately after the Union began the organization drive and continued unabated right up to the election and even after the election." On this basis, the Board endorsed the administrative law judge's conclusion that the Company's conduct tended to impede the election process and to render a fair rerun unlikely. This statement of reasons is sufficient to permit review and hence withstands the Company's procedural challenge.

In our view, the order also comports with the applicable evidentiary and substantive standards and lies well within the Board's discretion. The Company responded to the Union's most recent campaign with threats of plant closure, threats of retaliation against Union activists, and discriminatory discipline aimed at thwarting unionization. As is widely recognized, such conduct tends "to have a lasting inhibitive effect" on employees' formulation and expression

of free choice regarding unionization. NLRB v. Jamaica Towing, Inc., 632 F.2d at 213. It therefore justifies a *Gissel* order unless a very strong showing negates the inference of lasting effects. Because the record in this case reasonably supports such inferences, we cannot substitute our judgment for that of the Board. *See* Multi-Medical Convalescent & Nursing Center v. NLRB, 550 F.2d 974, 976 (4 Cir.), *cert. denied*, 434 U.S. 835 (1977). "In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." NLRB v. Gissel Packing Co., 395 U.S. at 612 n.32 (citations omitted).

III.

The Board's findings have substantial evidentiary support and its order was legally sound except as regards its finding that Lowery's conversation with Stephenson in March 1979 violated § 8(a)(1). Because there were other § 8(a)(1) violations to justify the Board's remedial order, it will be enforced.

ENFORCEMENT GRANTED.

BRYAN, Senior Circuit Judge, dissenting:

The majority holds the petitioner guilty of several infractions of the National Labor Relations Act, specifically sections 8(a)(1), (3) and (5) . I have no quarrel with the opinion of the Court insofar as it affirms the findings of fact and conclusions of law of the Administrative Law Judge (ALJ) with respect to employer misconduct. However, I cannot accept the Board's imposition of an order requiring petitioner to bargain with a union, such as the respondent, which has failed in two separate election cam-

paigns. In this solicitude for the Union, the majority and the Board forsake the outstanding exaction of this Circuit that such an order have a substantial and demonstrable basis in the evidence. Because the majority explicitly ignores this demand, I dissent.

In *N.L.R.B. v. Gissel Packing Co.*, 305 U.S. 575 (1969) the Supreme Court considered the propriety of bargaining orders in three situations. The primary consideration was of those "exceptional" cases marked by "outrageous" or "pervasive" unfair labor practices, regardless of whether the union ever has garnered majority sentiment. Bargaining orders clearly are fitting in those instances because infractions of this gravity "are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be had.'" *Id.* U.S. at 614, *quoting N.L.R.B. v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967). Just as clearly, the Court further concluded that bargaining orders are unsuitable in situations marked by minor, relatively insignificant disobedience having an insignificant effect on elections. "There is no *per se* rule that the commission of any unfair practice will automatically result in a § 8(a)(5) violation and the issuance of an order to bargain." *Id.* at 615. It is the middle position—the so-called category II—which controls here.

In the last-mentioned situation, where the employer has committed "less pervasive [unfair labor] practices which still have the tendency to undermine majority strength and impede . . . election processes," the Board is still entitled, in its discretion, to issue a bargaining order provided that the union at one time had a majority. *Id.* at 614. The Court stressed that, in the exercise of this discretion, "effectuating ascertainable employee free choice becomes as important a goal as deterring employer mis-

behavior." *Id.* Thus the Board must review the extent of past employer misconduct, its effect on elections, and the likelihood of recurrence in determining whether as extraordinary a remedy as a bargaining order is called for.

The General Counsel and the Union each defends on the naked assertion that substantial evidence justifies the order. The Court majority would also sustain the order, but in this it misconstrues the breadth of the Board's discretion.

We have had occasion to gauge the Board's issuance *vel non* of a bargaining order by the criterion of *Gissel.* In *N.L.R.B. v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979), we spoke to the standards the Board must meet in resolving the contentions pro and con. Particularly, the Court emphasized that an election, not a bargaining order, remained the traditional, as well as the preferred, method for choosing the employees' agent. Thus the Board may not so command simply upon its finding an employer guilty of unfair labor practices. *Id.* at 996-97. It is the constant obligation of the Board to explore the efficacy of the common remedies, explain why they would be ineffectual, and assess in detail what future misconduct, if any, could be anticipated.

This recital of the essential analysis was amplified in our second decision in *N.L.R.B. v. Appletree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982). There we reiterated that the Board should "make findings sufficient to establish . . . the continuing effects of the employer's misconduct and the ineffectiveness of the usual remedies . . . ." *Id.* at 841.

Even recently, in *N.L.R.B. v. Maidsville Coal Company, Inc.*, No. 81-2155, slip op. (4th Cir. August, 1982), this Court bore down on the principle that "before a bargaining order may issue, the Board must demonstrate, with par-

ticularity, why traditional remedies will not protect employees' rights under § 7 of the Act." *Id.* at 9.

As the petitioner accurately notes, neither the ALJ nor the Board endeavored to explain why a bargaining order would be the appropriate remedy. The Board fails to discuss other remedies and neglects to say what now prevents a fair election. Clearly, the Board has not borne its burden under *Gissel* and *Appletree Chevrolet*. Accordingly, its bargaining order should be refused enforcement.

(Filed December 23, 1982)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1673

Standard-Coosa-Thatcher Carpet Yarn Division, Inc.,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Amalgamated Clothing and Textile Workers Union, etc.,
Intervenor.

ORDER

The petitioner's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Winter, with the concurrences of Judge Hall, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin. Judge Russell, Judge Widener and Judge Chapman would have granted rehearing en banc. Judge Bryan dissents from the denial of rehearing.

For the Court,

/s/ William K. Slate, II
Clerk

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 10-CA-14634 and
10-RC-11707

STANDARD-COOSA-THATCHER, CARPET YARN DIVISION, INC.

and

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC

DECISION AND ORDER

On July 7, 1980, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, the Charging Party and the Respondent, respectively, filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Johnnie's Poultry Safeguards

As more fully described by the Administrative Law Judge, the credited testimony shows that Martha C. Perrin, the Respondent's counsel, advised employee Willis Langston that she was the Respondent's lawyer and that her inquiry about his authorization card was in preparation for hearing. Perrin asked Langston whether he had signed the card which was in front of them and whether employer Bobby Joe King described the purpose of the card to Langston. Langston promptly replied that he had read and signed the card and that there was no need for having King explain the purpose of the card because

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1. The Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. IV,C,4(a), of his Decision, the Administrative Law Judge inadvertently referred to Plant Manager Jack Bowman as "employee Bowman" and omitted Whisenant's question to Bowman. Thus, the third sentence, immediately following the sentence ending with footnote reference 35, should read: "Whisenant asked Bowman 'if our benefits would be taken away if the Union comes in.' Plant Manager Bowman acknowledged that the leaflet was correct and continued that after negotiations commenced benefits could go up or down or remain the same."

2. In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's dismissal of the allegation that Lowery's interrogation of Underwood, on or about April 19, 1979, violated Sec. 8(a)(1) of the Act.

Langston knew what he was signing. The credited testimony also shows that Perrin neither read the prepared statement[3] to Langston nor orally recited the safeguards therein.

The Administrative Law Judge found that the only real issue is whether or not Perrin's failure to assure Langston that there would be no reprisals rendered her inquiry violative of the Act. Although the Administrative Law Judge found that a strict application of the *Johnnie's Poultry*[4] standards would appear to require finding a violation, he nevertheless dismissed the allegation. In so doing, the Administrative Law Judge found that Perrin properly advised everyone of 70 employees interviewed except Langston of the safeguards, that the content of the meetings was widely known among the employees, and that "Langston was most likely forewarned about the content of the interviews." Hence, the Administrative Law Judge found that the coercive impact of Perrin's questions was minimal and he dismissed the allegation. We disagree.

Compliance with *Johnnie's Poultry* safeguards is the minimum required to dispel the potential for coercion in circumstances where an employee is interrogated concerning his intended testimony before the Board.[5] The effect of the Administrative Law Judge's Decision here is to substitute a different standard. He would excuse compliance where an employee "was most likely forewarned

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3. The prepared statement, set out in the Administrative Law Judge's Decision, explains, *inter alia*, that Perrin's purpose in talking with the employees was to help the Respondent prepare for an unfair labor practice hearing and that the interview was strictly voluntary on the employee's part.

4. *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964).

5. *Roadway Express, Inc.*, 239 NLRB 653 (1978).

about the content of the interviews. But *Johnnie's Poultry* safeguards require the Respondent not only to explain the purpose of the questions but also to assure the employee "that no reprisal will take place, and obtain his participation on a voluntary basis . . . ."[6] It is plain that the Respondent failed to satisfy these requirements in connection with Perrin's interrogation of Langston. We are not prepared to rely on speculation and surmise to infer compliance or to excuse the failure to provide the safeguards to Langston because the Respondent satisfied them with respect to other employees. The effect of the Respondent's failure to provide the safeguards during the Langston interrogation is the same whether by design or inadvertence. Hence, we find that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employee Langston with regard to the verification of the Union's majority.

The Bargaining Order

The Administrative Law Judge found, and the record shows, that the Union represented a majority of the Respondent's employees in the unit when the Union requested, and the Respondent refused, recognition in March 1979. The Administrative Law Judge also found that "Respondent's conduct had 'the tendency to undermine [the Union's] majority strength and impede the election processes,' that the continuing impact of Respondent's coercive conduct renders a fair election unlikely, and that the authorization cards signed by employees are a more reliable indication of their desire for representation." We agree.

In adopting the Administrative Law Judge's findings and recommendations, *supra*, we have taken into account

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6. 146 NLRB at 775.

that the serious and extensive unlawful activities by the Respondent commenced immediately after the Union began its organization drive and continued unabated right up to the election and even after the election. Thus, between the beginning of the organizational campaign in early February and the election held on May 18, the Respondent violated the Act by numerous instances of interrogation of employees about their union activities and those of other unit employees as well as by numerous threats of reprisals against employees because of their union activities. Such unlawful threats included threats of discharge, plant closure,[7] loss of access to management, and insistence on contract terms unpalatable to unit employees. Furthermore, the Respondent made unlawful implied promises of benefits to employees conditioned on the employees' abandonment of the Union. And the Respondent violated the Act by telling employees that the timing of work-related warnings was caused by the existence of union activities and by threatening employees with discharge because they engaged in concerted activity. After the election, the Respondent violated the Act by threatening retaliation against an employee because of her union activity and by the coercive interrogation of an employee concerning his intended testimony before the Board.

In addition to this plethora of acts of interference, restraint, and coercion against employees, the Respondent violated Section 8(a)(3) of the Act by more rigidly enforcing company work rules for the purpose of discouraging

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7. The Board has long held that the threat of job loss through plant closure or curtailment of operations interferes with employees' ability to make a free choice in an election. Thus, the threat of plant closure is among the most effective unfair labor practices for destroying election conditions for a longer period of time than other unfair labor practices. See *Ste-Mel Signs, Inc.*, 246 NLRB No. 177 (1979). See also *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 611, fn. 31 (1969).

union activities. This policy contributed directly to the discriminatory discharge of union adherent Dennis Williams. As the Administrative Law Judge pointed out, the Respondent's enforcement of this policy after the campaign began "would be the most effective way to short-circuit all such union activities."

Based on the foregoing, and the entire record in this case, we are persuaded that the Respondent's unlawful activities warrant a bargaining order under *Gissel*.[8]

Amended Conclusions of Law

Insert the following as paragraph II and renumber the subsequent paragraph accordingly:

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8 On April 20, 1981, the Respondent filed a motion to have the Board take administrative notice of a letter dated March 5, 1981, in which the Regional Director for Region 10 declined to issue a complaint concerning allegations contained in a charge in Case 10-CA-16538. In particular, the Respondent relied on a statement by the Regional Director that "[n]o evidence of animus occurring in the past six months was presented or adduced during the investigation." The Respondent goes on to claim that the Board is obligated to determine whether a fair election can be held based on conditions as they exist at the time of the Board's decision.

The General Counsel has filed a response to the Respondent's motion urging that the critical point for determining the appropriateness of a bargaining order is when the Respondent's unfair labor practices began to destroy the Union's majority status. Thus, the General Counsel contends that the March 5 letter is irrelevant to the issues before the Board.

It is our view that the validity of a bargaining order in this case and in similar cases should properly rest upon our analysis of the seriousness and pervasiveness of the unlawful conduct at the time that the conduct was first presented for our scrutiny. To conclude otherwise is "to put a premium upon continued litigation by the employer." *N.L.R.B. v. L. B. Foster Company*, 418 F.2d 1, 4-5 (9th Cir. 1969). See also *Gibson Products Company of Washington Parish La., Inc.*, 185 NLRB 362 (1970). Hence, we hereby deny the Respondent's motion.

Even were we to grant the Respondent's motion and consider the letter that the Respondent seeks to introduce into the record, it would not alter our finding that a bargaining order is required to remedy the serious and extensive violations of the Act by the Respondent.

"II. By coercively interrogating employees concerning their intended testimony before the Board, Respondent violated Section 8(a)(1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Standard-Coosa-Thatcher, Carpet Yarn Division, Inc., Boaz, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:[9]

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs accordingly:

"(d) Coercively interrogating its employees concerning their intended testimony before the Board."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the petition in Case 10--RC--11707 be, and it hereby is, dismissed.

Dated, Washington, D.C. July 29, 1971

.....
John H. Fanning, Chairman

.....
Howard Jenkins, Jr., Member

.....
Don A. Zimmerman, Member

(Seal) National Labor Relations Board

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9. In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their or other employees' union activities, memberships, or desires.

WE WILL NOT coercively interrogate employees concerning their intended testimony before the Board.

WE WILL NOT threaten our employees with discharge, plant closure, loss of access to management, insistence on contract terms unpalatable to them, or other unspecified reprisals because of their union activities.

WE WILL NOT promise our employees benefits conditioned on their abandonment of the Union.

WE WILL NOT tell our employees that the timing of work-related warnings was caused by the existence of union activity.

WE WILL NOT threaten employees with discharge because they engage in concerted activities protected by the National Labor Relations Act, as amended.

WE WILL NOT refuse to recognize or bargain with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive representative of all employees in the bargaining unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively with Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody that understanding in a written signed agreement. The bargaining unit is:

> All production and maintenance employees employed by us at our Boaz, Alabama, facility but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer to Dennis Williams immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, plus interest.

WE WILL rescind and expunge from our records all references to the four warnings issued Dennis Williams and all other warnings issued to employees on and after February 6, 1979, for violation of work rule 9

prohibiting unauthorized absence from the work area or the plant. Said work rule will be fairly enforced without unlawful discrimination.

All our employees are free to join Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, or any other labor organization.

Standard-Coosa-Thatcher, Carpet Yarn Division, Inc.
(Employer)

Dated ..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street, NW., Atlanta, Georgia 30303, Telephone 404—221-2886

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case Nos. 10-CA-14634[2]
10-RC-11707

STANDARD-COOSA-THATCHER, CARPET YARN DIVISION, INC.[1]

and

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC

Richard P. Prowell, Esq.,
of Atlanta, GA, for the
General Counsel

Gregory B. Tobin and
Martha C. Perrin, Esqs.,
of Atlanta, GA, for the
Respondent.

Barbara Jane Carey, Esq.,
of New York, NY, for
the Charging Party.

DECISION

Statement of the Case

CLAUDE R. WOLFE, Administrative Law Judge: This consolidated proceeding was tried before me at Boaz,

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1. The name of Respondent appears as amended at hearing by agreement.

2. When set for trial this proceeding included a complaint in Case 10-CA-13462. On January 2, 1980, the United States

(Continued on following page)

Alabama, on January 7, 8, 9, 10 and February 5, 6, and 7, 1980, pursuant to charges and amended charges timely filed, complaint issued and properly amended, and an order directing hearing on certain objections to election filed by the Union.[3]

The complaint, as amended, alleges violations of the Act consisting of interrogation, various threats, promises of benefit, promulgation and enforcement of a rule restricting the movements of employees, the issuance of written reprimands to an employee, the discharge of an employee, and a refusal to bargain collectively with the Union which has been designated by a majority of Respondent's employees in an appropriate bargaining unit as the exclusive representative of all employees in that unit for purposes of collective bargaining. It is further alleged that one of Respondent's counsel unlawfully interrogated two employees.

The Respondent denies the complaint allegations. The issues were ably litigated and ably briefed by all parties.

After careful consideration of the entire record, the demeanor of the witnesses as they testified before me, and the arguments and briefs of the parties, I make the following:

Footnote continued—

District Court for the Northern District of Alabama issued an order that, pending the Court's ultimate determination of its jurisdiction in the cause before it, the National Labor Relations Board, "its officers, agents, servants and all employees and all others acting in concert with or for it," were restrained and enjoined from holding a hearing on or adjudicating the unfair labor practice charge in 10-CA-13462. On January 4, the Regional Director for the 10th Region issued an order severing 10-CA-13462. Accordingly, I refused to take evidence on the allegations of 10-CA-13462 when General Counsel requested permission to adduce it as background.

3. The objections at issue are also alleged in the complaint as unfair labor practices.

Findings and Conclusions[4]

I. Jurisdiction

Respondent is an Alabama corporation engaged in manufacturing yarn at Boaz, Alabama. Respondent, during the calendar year preceding the issuance of the complaint, a representative period, sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Alabama. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organization

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. Supervisors and Agents

The Respondent admits that the following individuals are and have been, at all times material, statutory supervisors and agents of Respondent:

Earnest T. Bouldin - Personnel Manager
Jack Bowman - Plant Manager
Bennie F. (Butch) Harris - Shift Supervisor
Bill King - Shift Supervisor
Cecil King - Shift Supervisor
Frank Lowery - Shift Supervisor

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4. The facts found herein are a distillation of credible testimony, the exhibits, and stipulations of fact, viewed in the light of logical consistency and inherent probability. Although I will not in the course of this decision refer to every bit of record testimony or documentary evidence, I have weighed and considered it. To the extent that any testimony or other evidence not mentioned might appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative worth, surplusage, or irrelevant. I will set forth certain specific credibility findings as they may be required.

Respondent further admits that Richard Thatcher is a Director of Respondent. He testified he is Respondent's president, and I find he is its officer and agent. The parties stipulated that Mark Maddox is an agent of Respondent, and it is clear he is the Industrial Relations Director.

IV. Unfair Labor Practices and Objections to Election

Preface

I have made some findings herein of unfair labor practices not specifically alleged or alleged to have occurred on dates other than those pleaded. It is well-settled that violations not alleged in the complaint may be found where they are closely related to allegations in the complaint and have been fully litigated.[5] All violations found are indeed related, "if not in actuality falling within,"[6] complaint allegations and were fully litigated. Respondent was not denied due process in any way, and the referred to violations were properly found.[7] Moreover, I am not precluded from finding violations on alternative theories not alleged.[8]

A. *General Context*

The Union conducted a compaign among Respondent's employees commencing in July or August 1977 and culminating in a Board-conducted election on December 9, 1977 which the Union lost. There was no union organizational Campaign in 1978.

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5. *C & E Stores, Inc., C & E Supervalue Division*, 221 NLRB 1321, fn. 3 (1976).

6. *Omark - CCI, Inc.*, 208 NLRB 469 (1974).

7. See e.g. *The Estate of Alfred Kuskel d/b/a Doral Hotel and Country Club*, 240 NLRB No. 150, fn. 4 (1979).

8. *Joint Industry Board of the Electoral Industry and Pension Committee, et al.*, 238 NLRB No. 196, fn. 8 (1978); *C & E Stores, supra.*

On or about February 6, 1979,[9] John Kissack, who was then the Assistant Southern Director for the Union, conducted a meeting with several of Respondent's employees. At their request, he agreed to commence another campaign. He advised these employees that the Union did not want authorization cards anyone signed only to have an election, and that signers should understand they were signing to have a union and their cards might be used to show they wanted the Union.

Within a day or two of this meeting, the Union's international representative Virginia Keyser gave employees authorization cards for the purpose of their solicitation of other employees. The cards are unambiguous designations of the Union as the signer's collective-bargaining representative.[10]

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9. All events hereinafter recited occurred in 1979, unless otherwise stated.

10. The cards read:

AMALGAMATED CLOTHING and TEXTILE WORKERS UNION

Affiliate of the AFL-CIO, CLC

(DATE)_____ 19 ____

I hereby join with my fellow workers at the _____ company in organizing a union in order to better our conditions of life and secure economic justice, as is my right under the laws of the United States. To this end I declare that the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, shall be my representative in collective bargaining over wages, hours and all other conditions of employment. I make this pledge of my own free will in the conviction that the united action of all workers through unions of their own choosing is the way to achieve the liberty of the individual for the benefit of all.

PLANT NAME _____

DEPARTMENT _____ SHIFT _____

NAME _____ POSITION _____

(Do Not Print)

ST. AND NO. _____ PHONE _____

CITY _____ ZIP _____

(Received By)

Between March 21 and April 1, 1979, there were 147 employees in a unit of Respondent's employees alleged and admitted to be appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.[11] The General Counsel placed 88 authorization cards in the record which were signed by unit employees on various dates from February 8 through March 17. The Respondent specifically contests the validity of twenty of these cards.

On March 20, the Union filed a petition for representation election in Case 10-RC-11707, and the next day, March 21, made an unequivocal demand for recognition and bargaining.[12] Respondent agrees this demand was received, and that it has refused to bargain with the Union since March 21. Thereafter, the parties executed a Stipulation for Certification Upon Consent Election on April 10 and a secret ballot election was held on May 18. The Union lost and filed objections to the election, certain of which are now before me for resolution.

B. *Challenged Authorization Cards*

Authorization Cards Allegedly Secured by Misrepresentation

Respondent contends that authorization cards signed by the following employees may not be counted toward

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11. The appropriate unit description is:

All production and maintenance employees employed by Respondent at its Boaz, Alabama, facility but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

12. The telegram reads:

The majority of production and maintenance employees of your plant have chosen ACTWU as their bargaining agent. We are prepared to prove this majority. We call upon the company to commence negotiations on hours, wages and working conditions.

a union majority because they were secured by misrepresentation:

Ronald Bankston	Neil Langston
Jackie Collins	Richard Lybrand
James Collins	Lawrence Parker
Michael Dobbins	Robert H. Simpson
Pat Hand	Mary Frances Smith
Jan Harris	Wanda Windsor
Danny Hayes	

In evaluating the validity of each of these questioned cards I have been guided by the following teachings of the Supreme Court with respect to alleged misrepresentations in securing signatures to union authorization cards:

> . . . employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree . . . that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else . . . in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free

> choice by a too easy mechanical application of the . . . rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, . . . [footnotes deleted][13]

Ronald Bankston signed an authorization card on March 13. He read it before he signed it. Prior to his signing he had attended a union meeting where it was explained the cards were to join the Union and to get it into the plant. When he signed the card at the solicitation of Betty Underwood and an accompanying union representative he was told that employees would probably have better working conditions, and Underwood told him the card was needed to have an election and only a few more were needed. Bankston clearly knew prior to his signing that the card could be used for purposes other than to get an election. He read it before he signed, and I am satisfied he was not directed to disregard the express language thereon or was otherwise assured that it would be used only for an election. I find his card is valid.

Jackie Collins testified that when he signed a card on March 13, Betty Underwood told him they only lacked a few cards to hold an election to get the Union in and that his card would be destroyed and no one would ever know he signed it. He avers he "looked over" the card but did not read it thoroughly.

> [T]here is nothing in the circumstances surrounding the solicitation of the card to indicate he was assured

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13. *N.L.R.B. v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 606-608 (1969); and see *Jeffrey Manufacturing Division, Dresser Industries Inc.*, 248 NLRB No. 7 (1980) and *Keystone Pretzel Bakery, Inc.*, 242 NLRB No. 77 (1979).

> that the card would be used for no purpose other than to get an election. The absence of evidence indicating that [Collins] read the entire card does not . . . compel a conclusion that he did not intend to designate the Union as a collective-bargaining representative.[14]

Indeed, a purpose communicated to him was to get the Union in by means of an election. The promise to keep the card and destroy it at some unspecified time does not operate to destroy its validity.[15] I shall count his card.

James Collins signed a card on February 16 at the solicitation of Betty Underwood. He had seen the cards in prior campaigns, and testifies that Underwood asked him to sign a card, and then, after he returned it, told him it was just to get an election. I am persuaded by, the sequence in his account that the election factor was mentioned after he signed. That being the case, I cannot conclude that his signature was induced by Underwood's alleged election statement. He did not read the card before signing, but this does not establish he did not know what it contained inasmuch as he had seen such cards in other years and does not claim ignorance of its contents. I conclude that since he signed the card before Underwood mentioned an election, her statement was not an inducement to sign. I find the card is valid.

Michael Dobbins signed a card on February 25 at the solicitation of Bobby Joe King. He signed a card in 1977 during an earlier campaign, and there is no showing he was not aware of its contents. It therefore follows

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14. *Jeffrey Manufacturing Division, supra,* sl. op. p. 17.

15. *General Steel Products, Inc., and Crown Flex of North Carolina, Inc.,* 157 NLRB 636, 645 (1966).

that assuming, as he claims, that he did not read the 1979 card does not require a finding that he was unaware of the card's content. Before he signed the card, King told Dobbins that he thought the Union would help them and that a union would improve working conditions. King also told Dobbins that he was trying to get enough cards signed for a union election at the plant. I find nothing in King's statements amounting to an assurance that the card would only be used for an election, and I shall count it.

Patricia Hand signed a card on February 16 at the behest of Sheila Whitehead who told her it was to get an election. Although Hand claims she did not read the card, I am convinced she was aware of its contents in view of her testimony that she had solicited employees to sign cards in 1977 which looked the same as the 1979 cards. A statement of the sort attributed to Whitehead does not invalidate the card, and I shall count it.

Jan Harris signed a card on February 16. Betty Underwood, who solicited it, told Harris the card was for an election. Harris says she did not read the card, but I find this unlikely inasmuch as she filled out all of the spaces on the card but for that reserved for a witness thereto. In any event she was not told anything that would reasonably lead her to believe the language on the card would be used only for an election. Therefore, I find her card is valid.

Danny Hayes filled out and signed a card on February 11. He testified that Joe Whitehead gave him the card and said it was for an election, but he had earlier had a conversation with Whitehead in which Whitehead said, "Sign the blue card so we can get an election, get the Union in the mill," thus clearly indicating a purpose of

the card was to secure a union. There is no evidence Hayes did not read the card, and I conclude he is bound by the language thereon. I shall count his card.

Neil Langston had signed cards in previous elections, and I therefore find he was cognizant of the content of the one he signed on March 8 even though he may not have then read it. I observed the card solicitor Patricia King to be a more candid and believable witness than Langston, whose testimony was internally inconsistent,[16] and I find that she did not mention an election to him when securing the signed card. Accordingly, I shall count it.

Richard Lybrand signed a card on March 16 for Betty Underwood. I credit Lybrand that he did not read the card and Underwood told him it was "just for an election." I therefore find his card is invalid as obtained in reliance on Underwood's misrepresentation of its purpose, and I shall not count it.

Lawrence Parker signed a card at his home on February 20 during a meeting with Bobby Joe King, Joe Whitehead, and Kenneth Jones in which working conditions were discussed. Either King or Whitehead asked if he would sign a card, and he did. He was told the card was to get a union election, but there is no evidence he did not read it or was unaware of its contents. That Parker may not have been specifically told the card's purposes other than to secure an election does not controvert the express language of the card, and I shall count it.

Robert H. Simpson read a card and signed it on February 16. Although he testified it was his assumption

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16. He first testified that King told him nothing about the card, but then went on to say that King asked him to sign because they needed cards to get an election whereupon he told her he would sign it so there could be an election.

the card was for an election, he concedes that he cannot remember if the card solicitors told him that was the purpose of the card. Nothing probative having been proffered to invalidate Simpson's card, I shall count it.

Mary Frances Smith read, completed, and signed a card on February 14. Her testimony that Betty Underwood told her they were trying to get enough cards for an election does not affect the validity of her card, and I shall count it.

Wanda Windsor completed and signed a card on March 17. She states she was told by the solicitors that the card "would give a chance for the Union to come in there, to hold our election." There is nothing in her testimony to warrant a conclusion her signature was obtained by misrepresentation, and I shall count it.

Delora Copeland, Vera Garrard,
and Elbert Havis

The Respondent asserts that the signature of Copeland and Garrard on union cards have not been authenticated, the primary reason being that they do not resemble those on various company documents signed by them. Pursuant to Federal Rule 901(b)(3). I have compared the signatures on the cards allegedly signed by Copeland and Garrard with the signatures on documents proffered by the Respondent for comparison purposes. My examination convinces me that Copeland and Garrard did indeed sign the authorization cards which were received in evidence and properly authenticated by the solicitor thereof. They are both valid cards.

Jimmy M. Hopper gave Elbert Havis an authorization card in early February. Havis, who has considerable difficulty writing his own name either legibly or correctly

spelled, took the card home. His wife signed it with his name and filled out the rest of the card, including the date of February 14. Havis returned the card to Hopper the next day. The fact that Havis went to the trouble he did to complete a card and return it to the solicitor persuades me his act was intentional and he knew what he was signing. Moreover, I do not believe his wife would have signed it for him had he not wished her to. There is no showing that the purpose of the card was either unknown to him or inadequately communicated to him, and I cannot conclude, as Respondent would have me do, that because Havis does not write well he cannot read. I find that Havis' card is a valid designation of the Union, and I shall count it towards the Union's majority.

Gloria Stanfield, Mary Hornbuckle,
Bonnie Caswell, and Glenda Finley

The validity of the authorization cards signed by these four employees is challenged on the ground they were signed prior to the union campaign which commenced on or about February 6, 1979.

With respect to Stanfield's card, employee Betty Underwood testified she was present when Stanfield signed it on March 13, 1979, at the water fountain in the spinning room.

Stanfield states she signed the card in 1978, a couple of months after the December 1977 election, and gave it to Nellie Cook.[17] She avers that she was asked to sign a card a couple of times by Underwood, but does not say when or where.

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17. Cook did not testify.

The date on Stanfield's card appears to have been changed from "78" to "79." It is impossible to tell whose handwriting is involved in this alteration, but the remainder of the front of the card, but for Underwood's initials as the receiver and "S.C.T." in the company name space, was completed by Stanfield. Underwood wrote the location of the signing on the back of the card, dated it March 13, 1979, and signed her name.

I observed Underwood to be a more believable witness on the subject of Stanfield's card than Stanfield, and I note there was no union campaign in 1978,[18] March 13 is a date falling in the midst of the 1979 campaign, and the front and back of the card appear to have been completed with the same pen. Whether the date was changed due to initial error by Stanfield or Underwood is not certain beyond the shadow of a doubt, but I conclude it is more likely than not that the date originally entered by Stanfield was in error and that she or Underwood corrected it. I am persuaded that General Counsel has met his burden of proof in validating the card by a preponderance of the evidence, and that it is most probable the card was signed on March 13, 1979, rather than 1978. I credit Underwood that it was and find it to be a valid union authorization executed March 13, 1979.

Mary Hornbuckle's card is dated "2-16-79." It appears that the "79" has been changed but it is not clear on the card itself what the year read before alteration.[19] Hornbuckle testified she signed the card for Betty Under-

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18. The evidence so shows, and Respondent agrees in its post-trial brief that there was no organizing campaign between December 9, 1977 and February 6, 1979.

19. Although the Union argues that the underlying number was "78," I do not believe from my careful examination of the card that a mere visual observation can confidently determine whether "78" or "77", or even "79," was first written down.

wood in 1977, and did not sign one in 1979. Hornbuckle did not remember where she was when she signed it, where Underwood was when she gave the card to Hornbuckle, whether other employees were signing cards or distributing cards or union literature at the gate about the time she signed it, or when she signed the card in relation to a home visit from Underwood and Bobby Joe King prior to the signing. Underwood states Hornbuckle signed the card in her presence on February 16, 1979, and that Underwood completed the rest of the card, changing the date to 1979 after she had erroneously written 1978. She attributes this error to her inadvertence in continuing to write 1978 on various documents for a time after the beginning of 1979. Underwood further avers that she witnessed and dated the card "2-16-79" on the reverse side, and her signature and "2-16-79" do appear there. According to Underwood, she had talked to Hornbuckle with respect to the 1977 election but not again until she secured the signed card in issue. I credit Underwood and shall count the card.

Contrary to the Respondent, the date on Bonnie Caswell's card is not altered and clearly reads "2-9-1979." Caswell does not claim any alteration in the date, but contends it is in error because she did not sign a card for the 1979 election. She does not remember who gave her the card or to whom she returned it; states she does not know if handwriting on the card other than her signature is hers; and does not know whether she signed the card before or after December 1977. Underwood testified that Caswell signed the card in her presence on February 9, 1979. I credit Underwood and shall count Caswell's card.

Glenda Finley's card date has been altered from February 26, 1978 to 1979. Finley says she signed the card in

1978 after Patricia Hand gave her the card in the parking lot and asked her to sign it. According to Finley, Hand asked her several times to sign and told her it was to try to get another election. Finley filled out all entries on the front of the card. Underwood testified that Finley signed the card in her presence in the Boaz Mall on February 26, 1979. Hand says that Finley signed a card for her in February 1977, before the December 1977 election, in the parking lot, but Hand was not shown the specific card in issue when she testified. I do not believe the card before me is the same one Hand is referring to because although it may be that Hand obtained a card from Finley before the December 1977 election, it is plain that the changed entry was "1978," not "1977." As heretofore noted, there was no organizing campaign in 1978, and I do not credit Finley that she signed the card in 1978. I conclude that she signed the card in 1979, as Underwood testified and noted on the back of the card, but wrote "78" by inadvertence. The mere correction of the date by her or Underwood does not destroy its validity. I shall count it as a valid authorization card for purposes of ascertaining the Union's majority in 1979.

In view of my findings above, I conclude that the Union represented a majority of Respondent's employees in the unit found herein when it requested and was refused recognition as exclusive bargaining representative of said employees on March 21.[20]

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20. I have found 19 of the 20 cards challenged by the Respondent to be valid. The remaining 68 cards were properly identified and authenticated on the record and may therefore be relied upon as evidence of the Union's majority status. Eighty-seven of 147 employees signed cards, a clear majority, by March 17, and a simple majority of 74 valid cards was secured by the Union on February 20.

C. *Independent Violations of Section 8(a)(1) of the Act*

Preliminarily, I credit Patricia Whisenant's testimony that upon her hire in September 1978 she was told by Personnel Manager Earnest Bouldin that the company did not want a union and it would not be good for the company or its employees. This statement occurred more than 6 months prior to the filing of the first charge in Case 10-CA-14634, and therefore may not be found to be an unfair labor practice. It may, by long established precedent, be considered as background evidence shedding light on events within the statutory period.[21]

1. Conduct of Bennie F. (Butch) Harris Supervisor

(a) On or about February 13, Harris took Kathy Cahela Holland from her work station to the nurse's station and locked the door behind them. I credit Holland's account of what then happened over that of Harris because she was the more impressive witness, and for the further reason that as a current employee she would not likely deliberately fabricate testimony injurious to her employer who controlled her employment future.[22] I also note that Harris concedes he was trying to find out if Holland was still prounion.

Holland asked what she had done. Harris replied she had done nothing and he just wanted to know why she wanted a union. She gave reasons and they engaged in colloquy as to what the Union could do about seniority. Harris then opined that they would all be out of a job

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21. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al., v. N.L.R.B.*, 362 U.S. 411, 416 (1960).

22. See e.g. *Staco, Inc.*, 244 NLRB No. 49, JD 42 (1979).

if the Union got in at Boaz. She disagreed and asked why he thought that. He said that the company would combine the Boaz and Guntersville[23] employees and close the Boaz plant. She stated her disbelief, and Harris said he knew it was true, had seen it in black and white, and was fearful he would also lose his job.

I find that Harris violated Section 8(a)(1) of the Act by interrogating Holland about her union desires and threatening plant closure with resulting loss of jobs if the Union got in at Boaz. This conduct was made even more coercive by the content in which it occurred, mandatory attendance in a locked room.

(b) In mid-February, Harris took Patricia Whisenant off her job and into his office where he locked the door and they conversed.[24] Harris showed her an enlargement of a union card and asked her either if she had seen one or if she knew what it was. She replied that she had not and did not. Harris told her that he knew she had signed a card and asked why she had signed, coupling this inquiry with a statement that by signing the card she had signed away her rights to the Union. Harris concedes he told Whisenant that there was a union at Guntersville, and I find also that he also said that the employees would be no better off at Boaz than at Guntersville and that the Guntersville union president had traded employees' grievances for a pay increase. He went on that she would have to go to a union steward rather than the company personally and that the company would close the plant

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23. The Respondent has a plant at nearby Guntersville, Alabama, which is covered by a union contract.

24. I credit Whisenant where her account and that of Harris differ. She was a more believable witness in terms of comparative demeanor. In this connection, I specifically note that Harris appeared to be uncertain and reluctant on this incident whereas Whisenant did not.

if the Union got in. I find that Harris interrogated Whisenant about her union activity by asking why she signed a card, threatened her with loss of access to management,[25] and threatened plant closure, all individually and collectively violative of Section 8(a)(1) of the Act. I also find that such conduct is particularly coercive when delivered in the privacy of the supervisor's locked office to which the employee was peremptorily summoned.

(c) Timothy White testified that Harris walked up to him in mid-March and said that if the Union came in the bench White sat on to rest in his work area would be taken away and if employees overstayed a break by 1 minute Harris would issue warning slips to them. Harris denies making these statements. Although I do not credit Harris on other matters I do credit him here. The credible evidence establishes to my satisfaction that there was in fact no such bench in White's work area, and White's testimony struck me as contrived evidence given in an unconvincing manner. Accordingly, General Counsel's evidence on this allegation does not preponderate, and I shall recommend that it be dismissed.

(d) Timothy White testified to certain events on or about May 8. According to White, he was called into Plant Manager Jack Bowman's office where, in the presence of employee James Collins and possibly Personnel Manager Earnest Bouldin, Bowman said that White had filed a charge against the company. White avers he denied this and Bowman showed him the charge filed on May 4, 1979, in Case 10-CA-14634 by the Union which contains the names of Collins and White as alleged discriminatees.[26]

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25. *Sacramento Clinical Laboratory, Inc.*, 242 NLRB No. 136, sl. op. p. 3 (1979); and see *Colony Printing and Labeling, Inc.*, 249 NLRB No. 2 (1980).

26. The complaint herein does not so allege.

White continues that Bowman gave him a copy of the charge whereupon White asked how he could find out more about it and received the answer it would have to be investigated. Later the same day, says White, he went into Harris' office to report on work as usual, and Harris asked why he filed the charge, which he denied. Harris then allegedly stated that he had had a lot of reasons to fine White, and that he could tell White was union, "that it showed."

Harris' version is in substance as follows. White and and James Collins asked him about a charge being filed. He then told them he had seen it, and they said they filed no charges against him and did not know how it had happened. They asked who would have filed the charges besides them, and he said he didn't know. Harris then went and told Bowman that White and Collins knew nothing about the charge, had not filed them, and had not signed anything. Bowman offered to show it to them. Harris went and got them. Bowman showed them the May 4 charge and was unable to explain to them how their names came to be on the charge. White and Collins asked who to see to find out about it, and Bowman referred them to the name and address on the charge. I conclude Bowman was pointing out the name and address of the Charging Party.

Harris denies any later conversation with White about the Union or making the statements White claims he made in his office later in the shift.

Neither Bowman, Bouldin, nor James Collins testified about this incident. The absence of their testimony leaves a straight credibility conflict on significant points between Harris and White. I doubt that Bowman would have summoned White to the office for the purpose of accusing him of filing a charge plainly showing the Union as the Charg-

ing Party, and note there is no contention Bowman similarly accused Collins whose name precedes that of White in the body of the charge. Moreover, I do not believe it probable that Harris would later have inquired why White filed a charge which he had already denied filing. On the whole, the testimony both of Harris and White leaves something to be desired in terms of exactitude, but that of Harris appeared to be delivered in a less tentative manner and with greater assurance. In short, I observed Harris to be more believable on the events of May 8, and I credit his affirmative testimony as well as his denials of the statements attributed to him by White. Accordingly, I find that General Counsel has not shown by a preponderance of the credible evidence that Harris made unlawful statements on May 8 as alleged.

(e) I credit Patricia Whisenant that, on May 21, Harris walked up to her and asked where her "god-damn" union was and, after she replied it was coming and they were going to court, further stated that she was not satisfied getting in as deep as she was but just kept on getting in deeper and deeper.

I am persuaded that Harris' question and commentary emphasized that the Respondent strongly disapproved of the Union and Whisenant's activity on its behalf, and conveyed that she was in deep trouble with the Respondent, and getting deeper, because of that activity. Harris' statements were clearly calculated to make Whisenant fearful of Respondent's reaction to her protected union activities which it viewed in an unfavorable light. I therefore find that Harris threatened Whisenant in violation of Section 8(a)(1) of the Act. That he did not specify what Respondent's retaliation might be does not diminish the seriousness of the threat.

2. Conversation of employee Leon Taylor with Personnel Manager Bouldin and Shift Supervisory Cecil King

Around the first of May, Taylor, who has since quit due to health problems, had been complaining that his workload on his second shift yarn service job was too heavy. Unbeknownst to Taylor, the Respondent had commenced a new timestudy on the yarn service job but had not as yet reached his shift. I credit Bouldin that the timestudy was motivated by the movement of machinery and find that neither anti-union considerations nor Taylor's complaining precipitated it.

During the first week in May, Bouldin approached him and said he had heard Taylor was complaining about his job. Taylor replied that he had too big a workload. Taylor testified on direct examination that Bouldin then said employees would not have any additional benefits if the Union came in, and mentioned the Guntersville plant. On cross-examination Taylor stated that he does not recall what Bouldin said after Taylor responded to Bouldin's initial question about his complaint, and further stated that he believed Bouldin's response to his complaint of too much work was all that was said. Bouldin testified that after Taylor said he was overloaded he (Bouldin) advised him of the timestudy on the first shift which would soon be extended to the second shift. Bouldin denied that either the Union, benefits, or trouble for Taylor were mentioned during this conversation than Taylor who delivered his testimony in an uncertain manner, obviously contradicted his own direct testimony on cross-examination, and was not a convincing witness. I therefore credit Bouldin and find that he did not, as General Counsel alleges, unlawfully threaten Taylor or otherwise violated Section 8(a)(1) of the Act by his statements to Taylor.

Taylor testified to a conversation with Cecil King at about the same time period as that with Bouldin, wherein King told him that first shift jobs had been timed and his job was going to be timed next, and then said that the Union would do him no good if it came in.

According to Taylor, he had another conversation with King about a week later when King called him into his office and told him he did not know what Joe Whitehead (an active union proponent) was putting in Taylor's head but the Union would not help Taylor, or get him anymore benefits, or reduce his job duties. Taylor avers that King added that if Taylor did not keep his job up he might be fired. In response to my question, Taylor placed this conversation before the May 18 election. On cross-examination he first placed it *before* the election. Then, when confronted with his pre-trial affidavit given to the Board, conceded that he had said therein the conversation occurred in the last week of May (which was *after* the election), and stated his affidavit, given on June 10, 1979, was truthful. Unaccountably, Taylor then again testified the conversation happened *before* the election, but also reiterated that his affidavit was truthful.

Cecil King testified that Taylor complained to him on various occasions that he had too much work to do, and received help from King. King denies any discussion of the Union during these conversations about Taylor's job. King did recall an occasion, approximately between May 8 and 11, when Taylor came to his office, told him Whitehead was pressuring him to sign a union card, and asked King what he thought about the Union. According to King, he told Taylor what the existing company benefits were, that if the Union came in more benefits would have to be bargained for, and that King did not think the Union would help at Boaz. King denies informing Taylor he would lose benefits if the Union came in.

Taylor did not impress me as a candid or reliable witness as he testified in an uncertain and unconvincing manner. I do not credit his testimony, and I do credit the version of King who testified in a straightforward, believable manner. I find that none of Cecil King's statements to Leon Taylor transgressed Section 8(a)(1) of the Act.

3. *Statements of Personnel Manager Bouldin*

(a) On a Saturday afternoon in mid-February, Bouldin was having his car serviced, and walked toward the adjacent Holiday Inn to have some coffee. Patricia Whisenant, who was parked in the Holiday Inn lot conversing with employee Jesse Roden who sat in another car next to hers, saw Bouldin and became apprehensive that Bouldin would think she and Roden were having an affair rather than waiting to meet union organizers. She called Bouldin to her car, as Roden drove off, and told him that she was not there for a liaison with Roden. From this point the accounts of Bouldin and Whisenant differ.

Whisenant's version

Bouldin told her he knew she was there to see union people; if she did not watch it she would get in trouble; and she should be back at work. They talked longer but she does not recall what was said. About 10 minutes later she saw him in the coffee shop. Two friends, Finley and Lemons (neither of whom testified on this matter) went in to talk to Bouldin. One returned and told Whisenant that Bouldin wanted her to come in. She went in, does not remember everything that was said, but knows Bouldin and the employees talked about the Union and the presence of its organizers. She recalls that Finley or Lemons said it was Kathy Cahela's fault, not Whisenant's, that Whisenant was at the Holiday Inn.

Bouldin's version

He replied to Whisenant's remarks about her relationship with Roden by saying it was her business. He went inside the coffee shop. Five or 10 minutes later Whisenant, Lemons and Finley came in. Whisenant again explained her meeting with Roden was not what it looked like, and said that they were there to see a piece of paper that employee Betty Underwood possessed. They all then left. There was no conversation with Whisenant about the Union and no mention of people being in trouble.

But for Whisenant's concern that her relationship with Roden might be misconstrued, the parking lot conversation would probably not have occurred. Bouldin was on his way to get coffee and his attention was drawn to Whisenant by her calling him over. I am persuaded that Bouldin's presence at the Holiday Inn has not been shown to have been prompted by any reason other than chance and a hankering for a cup of coffee. Whisenant's recitation struck me as manufactured to capitalize on the unexpected presence of Bouldin, and I do not credit her that Bouldin told her he knew she was there to see union people,[27] that she would get in trouble if she didn't watch out, or that she should return to work. Nor do I credit her, in the absence of any corroboration, that Bouldin sat talking about the Union and its organizers with the three employees. I credit Bouldin's account because he was the more believable witness with respect to the events of this day and because his account seems the more likely to me to the extent that it reflects that the topic of discussion was the true import of Whisenant's meeting with

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27. I agree with Respondent that there is no evidence, or even a fair inference or warranted suspicion, that Bouldin had any reason to believe or assert that Whisenant was in the parking lot to meet with anyone other than Roden.

Roden, rather than some meeting with union organizers which has not in fact been convincingly shown to have occurred or even been scheduled. General Counsel has not shown by a preponderance of the credible evidence that Bouldin violated the Act in any fashion on this occasion.

(b) I credit Whisenant's testimony that some time in mid-February she was talking to Bouldin when Kathy Cahela Holland walked by without speaking and Whisenant told Bouldin, when he asked what was wrong with Holland, that Holland was involved in the "Union business." To which Bouldin stated that if Holland did not watch it she would get fired. This statement by Bouldin, in the context in which it was uttered, was a threat of discharge for union activity and violated Section 8(a)(1) of the Act.

(c) In early or mid-March, after Bouldin had advised her that she was not getting a job she had applied for, Whisenant became emotionally upset and told Bouldin, "[Y]ou just hate me." He replied that he would like her a lot more if she was on the right side, a transparent reference to her prounion posture. Bouldin does not directly deny this testimony and I credit Whisenant.[28]

Nevertheless, I do not agree with General Counsel that Bouldin's statement was a threat advising Whisenant that benefits were contingent upon her being opposed to the Union.

Bouldin's statement certainly made it clear that he knew or believed she was for the Union, but I discern

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28. I do not consider Bouldin's bare denial that he ever indicated to Whisenant that she had a better likelihood of getting the job she applied for if she was on the right side as an adequate response to Whisenant's specific testimony.

no element of threat in the statement. I do find, however, that Bouldin's comment reasonably tended to convey to Whisenant that she would be in Bouldin's good graces were she against the Union. It seems to me that this was an invitation to abandon the Union in order to obtain whatever benefits might flow from the improved relationship with management thereby obtained. I find this to be interference with Whisenant's union activities and violative of Section 8(a)(1) of the Act.

(d) I do not credit Martha Houchin White, an uncertain and unimpressive witness,[29] that, in mid-March while she thinks she was changing her insurance, that Bouldin said:

> Just something about the union; if I knew who was union—who was company. He was telling me that if the union came in that they would take all of the benches out of the smoking areas throughout the plant.

This testimony consists of conclusions bereft of adequate specificity. Bouldin's testimony in contravention impressed me as more believable. Accordingly, I find that Bouldin did not on this occasion unlawfully interrogate or threaten Martha Houchin White as General Counsel alleges.

(e) Martha Houchin White testified that, in mid-April during a conversation whose start she does not remember, Bouldin and Plant Superintendent Jack Bowman, which one she does not recall, told her that if the Union

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29. White was discharged by the Respondent for falsifying her age on her job application. Both the discharge and the falsification are relevant factors in evaluating her credibility, but I would not credit her on demeanor alone if these factors were not present.

came in it would[30] be a while before employees got a raise and they might lose some vacations and insurance benefits.

Bowman, a methodical and precise witness who testified without hesitation, avers that White asked to talk to him and Bouldin while they were in her area. They agreed. White asked if it were true employees could lose certain benefits if the Union came in. Bouldin started to respond.[31] but Bowman interrupted and told her Respondent was not saying she would lose anything if the Union won the election, but if it won there would have to be negotiations where she could get a little more, remain the same, or lose some. He named several benefits of which this would be true, with unknown results until negotiations were complete. He also mentioned that the negotiations at Respondent's Guntersville plant had taken about a year, but Respondent didn't know how long negotiations would take, maybe a short time or maybe quite some time.

I credit Bowman's version on the basis of comparative demeanor, certainty of testimony and believable detail. I am inclined to the conclusion that White misconstrued what was actually said and testified to this misconstruction. I conclude and find General Counsel has not shown by a preponderance of the credible evidence that Respondent violated Section 8(a)(1) of the Act during this mid-April conversation. *Belcher Towing Company*, 238 NLRB No.

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30. She conceded on cross-examination that she does not recall whether they said "would" or "might" with respect to the raise.

31. I do not credit Bouldin that he had no conversation with White about the Union or benefits after his mid-March conversation. What he said is unknown, but to the extent he was a party to this conversation, his claim of no such talks is discredited.

63, ALJD pp. 24-26 (1978); *Wex-Tex of Headland, Inc.*, 236 NLRB 1001, 1004 (1978).

(f) I credit Patricia Whisenant's straightforward recitation that she went up to Bouldin on May 17, and told him she was sorry that she had to work against him in the Union and that she would be on the gates the next morning.[32] Bouldin asked what the company had done to her and what did she have against the company. She told him, "Nothing." He then asked why she was working for the Union, and she replied that she believed in it. Such inquiry into Whisenant's reasons for supporting the Union tended to coerce her in the exercise of her Section 7 rights, even though she had openly declared her union adherence. I therefore conclude that Bouldin's probing into Whisenant's motives for supporting the Union constituted coercive interrogation in violation of Section 8(a)(1) of the Act.[33]

4. More conversations of Plant Manager Jack Bowman with employees.

(a) On or about May 11, Bowman and Patricia Whisenant had a conversation at work.[34] Whisenant had a union leaflet in her possession which recited that a com-

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32. She had previously distributed literature at the Respondent's gate.

33. *ITT Automotive Electrical Products Division*, 231 NLRB 878 (1977).

34. The recitation of what was said is a composite of the credited portions of the testimony of each. I am persuaded that what is here present is a failure of communication. Bowman's recitation is consistent with what he had earlier told Martha Houchin White with regard to the fate of benefits if the Union won the election. Whisenant's version appears to be, in large part, her subjective understanding of the meaning of what Bowman said rather than an accurate report as to what he actually said. I credit Bowman, where there is testimonial conflict with Whisenant, because he appeared the more certain and candid of the two.

pany could not unilaterally discontinue employee benefits after a union wins a Board election.[35] Whisenant asked Bowman if employee Bowman acknowledged that the leaflet was correct and continued that after negotiations commenced benefits could go up or down or remain the same. He also mentioned that negotiations at Respondent's Guntersville plant had taken about a year and it was an unknown as to how long negotiations would last but they could take a short time or a long time. He further stated that negotiations would start at zero. After Bowman's comments, Whisenant said she knew he was not lying and left the area.

Noting that Bowman's comments were generated by Whisenant's inquiry, I am persuaded that his remarks were designed to advise Whisenant of the various possibilities with respect to benefits which might result from negotiations. He neither predicted nor threatened adverse consequences with respect to benefits. I find his comments with respect to the possibility that benefits might be reduced as a result of negotiations were protected observations under Section 8(c) of the Act, and did not violate Section 8(a)(1) of the Act. *Wex-Tex of Headland, supra.*

(b) Although the testimony of Kathy Cahela Holland is entitled to considerable deference where it is adverse to her current employer, the Respondent, she appeared to be straining and attempting to embellish the events

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35. Respondent introduced this document in evidence. It bears the Union's logo and recites, with supporting excerpts from Board cases, that benefits may not be taken from employees as punishment for their union activities. The Union's International Representative, Virginia Keyser, testified that although this is a stock union leaflet it was not used in the 1979 campaign. Whisenant was uncertain as to whether or not she had the leaflet with her. Whether the leaflet was distributed during the 1979 campaign or at an earlier time does not determine whether or not Whisenant had it in her possession. I credit Bowman that she did.

of May 18, when she and Bowman had a conversation. Bowman was more believable than Holland with respect to this conversation. I credit him, and I find that on the morning of May 18, before the election, Holland commenced a conversation with Bowman by saying that she had read a copy of the Guntersville contract and could find nothing in it which would benefit employees. Bowman then told her that he wanted her to understand that the Guntersville contract was the first thing Respondent's lawyer would insist on in negotiations if the Respondent lost the election.

I agree with Respondent that Bowman's testimony does not establish that the Respondent would not bargain in good faith with the Union, but that is not the question. The question is whether Bowman's statement to Holland was a threat that Respondent would not bargain in good faith with the Union if it was selected. I believe this question requires an affirmative answer. The Respondent's argument that Bowman only referred to the Respondent's "*initial*" position in bargaining adroitly attempts to resolve the issue through semantical argument. I do not believe that Holland was required to know or suspect or even hazard a guess that the Respondent's first insistence on the Guntersville contract terms was not immutable. The burden was on Bowman to explain this if it were true. I find that the statements of Bowman had a reasonable tendency to impress upon Holland that the Respondent would insist on the terms of its Guntersville contract as a condition of a Boaz contract and thus render bargaining a futile exercise insofar as achievement of employee goals was concerned. That the statements were made within hours of the upcoming Board election and were directed at an employee who Respondent knew considered the Guntersville contract of no benefit to Boaz

employees increased their impact. I conclude that Bowman's threat of insistence on unpalatable contract terms interfered with, restrained and coerced Holland in the exercise of her Section 7 rights, including the right to freely cast a ballot in a Board election without being intimidated by the Respondent in the exercise of that franchise, and thus violated Section 8(a)(1) of the Act. There is no credible evidence Bowman unlawfully interrogated Holland.

5. Conduct of Frank Lowery, Shift Supervisor

(a) On February 25, 1979, Lowery called employee Melinda Kennedy from her work into his office. Lowery concedes that he asked Kennedy if she had seen one of the union authorization cards and did she know what she was signing when she signed one of them. This compound question by a supervisor in a locus of supervisory authority away from the employee's work station constituted coercive interrogation of Kennedy with respect to her protected activity of signing a union card and her motives in so doing, without any assurances of no reprisals, and served notice on her that Respondent knew she had signed a union card, Lowery's interrogations violated Section 8(a)(1) of the Act.

Kennedy's testimony on this meeting with Lowery merely adds that Lowery solicited questions about the Union from her and gave generally noncommital answers when she inquired about benefits of a union label, an incentive system, etc. Kennedy credibly avers that Lowery volunteered that if the Union came in employees would get paid no more because the company would only pay so much. I do not believe that this latter volunteered statement on wages constitutes a threat in the usual sense,

but it does convey the idea that the selection of the Union would be a futile gesture insofar as wage increases were concerned. To that extent, Lowery's statement tended, in some degree at least, to interfere with and restrain Kennedy in the exercise of her Section 7 rights, and its import was exacerbated by the context of a closed meeting with a supervisor in his office wherein he had already coercively interrogated her. Accordingly, I find the comment on the future of wages violated Section 8(a)(1) of the Act.

(b) On or about March 17, 1979, Rebecca Stephenson asked Lowery for permission to take some time off work. He responded that since she had not signed a union card he would let her be off. She told him that she had signed one. I credit Stephenson that Lowery then told her that if she signed a card she automatically had to join the Union if it came in. I credit Lowery that he also told her that if she needed to be off he would still "work with you" whether or not she had signed a card.

In my view, Lowery's initial comment indicating he thought Stephenson had signed a union card amounted to a solicitation of a response as to whether or not she had signed one. This is interrogation into union activities prohibited by Section 8(a)(1) of the Act.[36] I do not agree with General Counsel that Lowery's implied question was also a threat of reprisal against employees who designated the Union to represent them. It might be construed as a grant of benefit because Lowery thought Stephenson was not a card signer. In either case, grant or threat, Lowery's subsequent statement amounts to a promise to treat her leave requests as he had in the past, regardless of whether or not she signed a card and effec-

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36. That Lowery may have thought he was joking does not mean Stephenson did.

tively erased any coercion that may arguably be inferred from his initial statement. Moreover, Lowery granted her leave requests on several occasions thereafter. I note that Alabama is a right-to-work state and Lowery's statement of the requirement to join the Union amounts to the dissemination of misinformation, but I am persuaded his erroneous comment on this topic does not rise to the stature of a threat violative of the Act.

(c) Some time in March 1979 employees Joe Whitehead and Bill Renfroe were discussing what the Union could do for them. Lowery was present and commented either "it'll hurt you," as Whitehead first testified or that "it could hurt," as Whitehead acknowledged on cross-examination.[37] It is questionable whether the first version constitutes a threat and the second clearly does not. In view of Whitehead's modified testimony, I find that General Counsel has not shown by a preponderance of the evidence that Lowery threatened employees in violation of Section 8(a)(1).

(d) It appears that Respondent has a rule against dropping hard waste on the floor. On March 5, 1979,[38] Lowery issued a verbal warning to Betty Underwood, an outstanding union protagonist, for an infraction of this rule.

According to Underwood, Lowery spoke to her about dropping hard waste, said that he knew she was in a union campaign and would do nothing to break a rule

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37. Lowery says he probably said it could hurt but denies saying it would hurt.

38. Underwood claims she received the warning in late March or early April, but I am persuaded by the written record of the warning, which Lowery convincingly authenticated, that the warning was given on March 5. Underwood's erroneous testimony on the date is insufficient to collaterally discredit her on other matters.

during this time period, and recited that he was going to break her from a bad habit while the Union was in town.

Lowery testified that he reminded Underwood that he had several times spoken to her about the hard waste, told her he was giving her a verbal warning and making it part of her record, and stated that he felt it would be a good time for her to break the habit of throwing hard waste on the floor. This was the only verbal warning he ever gave her for this offense.

Neither witnesses' demeanor provided me with any convincing clues as to which gave the more accurate account, but the fact that Underwood was still employed by Respondent and supervised by Lowery at the time she testified persuades me that she was not likely to be deliberately fabricating testimony reflecting adversely on Lowery's conduct, and Lowery does not specifically deny mentioning the Union. I therefore credit her version where it varies from that of Lowery.

There is obviously nothing unlawful about reprimanding an employee for violation of what appears to be a legitimate company rule, but it is unlawful to advise the employee that the timing of the warning was precipitated by the presence of the Union because this clearly puts the employee on notice that union activities not only caused this warning but may cause other adverse actions to be taken by the employer. I find that Lowery did make an implied threat to Underwood of reprisals for union activity and the issuance of the warning on March 5 was motivated by the presence of union activity. Both violated Section 8(a)(1) of the Act.[39]

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39. It is not alleged in the complaint that the warning was given in violation of Section 8(a)(3), and the remedy would be the same in any event.

(a) On or about April 19, 1979, Lowery and Underwood had another conversation. The Union had distributed a notice of the time and place of its next meeting, but left the space for the agenda vacant. I credit Underwood that Lowery jokingly said that it was no wonder there were not more people at the meeting if this was all that was on the agenda. Underwood told him not to worry about it because there would be something on the agenda. Lowery rejoined, "No kidding, what have you got on the agenda for Sunday?" She asked why he didn't come to a union meeting and find out inasmuch as he had been a union person, and that he might enjoy it.

I am aware that tortuous reasoning can wring ominous nuances out of the slightest statement, but I cannot in good conscience conclude that this conversation contained anything more than good-natured banter and innocuous repartee, or had any reasonable tendency to infringe on Underwood's statutory rights. I therefore find that Lowery did not unlawfully interrogate Underwood as General Counsel alleges.

(f) On or about April 24, or 25, or some time in May,[40] Lowery told Elizabeth Sharp that he knew she was friendly with Betty Underwood, but thought Sharp was on his side. She replied that she did not know what he was talking about. He said she knew what he was talking about, and that he still thought she was on his side.

Considering that the record fairly establishes that Underwood was a leading supporter and there appears to be no other reason for Lowery to refer to Sharp as being on some side or other, I conclude that Lowery's enigmatic

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40. The record is not clear as to which was the date of this incident.

statement translates into an effort to elicit a statement from Sharp as to whether she was for or against the Union.[41] This is unlawful interrogation into her sympathies vis-a-vis the Union and violates Section 8(a)(1) of the Act.

(g) On or about May 3, 1979, employees Dingler and Renfroe started discussing the Union in Lowery's presence.[42] I find Lowery's version more believable and his delivery more convincing than that of Dingler, Lowery interjected into the conversation that his wife had not been helped by being a union officer when she worked at a union plant and was changed to a lower paying job. It is not clear whether he also said that he had kidded his wife by asking her why she did not go to her union if she was being so mistreated, or if this com was tacked on at the hearing as a side remark to the judge. I got the impression the latter was the case. In any event, I find nothing unlawful in Lowery's comments to Dingler and Renfroe. He interrogated nobody on this occasion, and I shall recommend the allegation of interrogation be dismissed. Nor do I find that his comments were an unlawful effort "to impress upon Dingler the futility of supporting the Union."

(h) On May 11, 1979 several employees, including Underwood, were short $2 in their paychecks because of a computer error. On May 12, they protested to Plant Manager Bowman who explained the computer error and

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41. If Lowery's statement is susceptible of several meanings, as Respondent argues, the burden of clarifying any ambiguity fell on Lowery not Sharp. She in effect asked him what he meant, but he elected merely to repeat himself, stating that she knew what he was talking about. Inasmuch as his comment could reasonably be construed as unlawful interrogation, and he made no effort to clarify to show it was not but chose to remain mysterious, there is no reason to assign it another meaning.

42. Renfroe had been walking with Lowery.

promised the mistake could be corrected on their next paycheck.

That evening, May 12, Lowery approached Underwood at her work station and asked what had happened with respect to the pay problem.[43] Underwood told him that the company had been going to take the employees' five-cent premium pay for the shift away from them. Lowery said, "Just raise hell, Betty . . . if you'll notice, Dennis Williams raised hell for a couple of weeks, and he's not here any longer." (Williams had been discharged about a week before this.) Underwood told Lowery that if that was a threat she would not be as easy as Williams to get rid of. Lowery pointed out it was a "one-on-one" conversation and his word was as good as hers. She retorted that they would let the government decide whose word was as good as hers. She retorted that they would let the government decide whose word was best. That ended the conversation.

I agree with the Respondent that Lowery did not threaten Underwood with discharge "if they joined or engaged in activities on behalf of the Union" as the complaint alleges. Underwood was, however, engaged in protected concerted activity when she and others protested the pay shortage, and Lowery's statement was a threat of discharge because she was complaining of that shortage. Her complaint was a direct continuation of her concerted activity. Lowery's statement was patently interference, restraint, and coercion of Underwood in the exercise of her Section 7 rights. The matter was fully litigated and the threat was alleged as a violation of Section 8(a)(1) of the Act. Respondent had ample notice of the nature of the violation from her testimony of January 7, 1980,

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43. I credit Underwood on this topic.

and adduced evidence from Lowery, which I have not credited, in response thereto on February 6, 1980. Accordingly, I am persuaded that the incident was adequately covered by the allegations of the complaint and the general 8(a)(1) allegations of the amended and second amended charges, was litigated, and may be found a violation of Section 8(a)(1), which I now find Lowery's threat to be.

6. Conduct of Richard C. Thatcher, Jr., Respondent's President

The General Counsel alleges that Thatcher threatened loss of benefits in an address given to several employees, and proffers employees Kathy Holland, Elizabeth Sharpe, Betty Underwood, and Melinda Kennedy as witnesses in support thereof.

The meeting in question was conducted by Thatcher with six employees in the plant's laboratory at about 6 a.m. on May 8. Mark Maddox, Respondent's Industrial Relations Director, was also present.

Holland testified as follows:

> Mr. Thatcher asked us about, you know, why we were wanting a Union and stuff like that. And I remember one thing that he said specifically when we were talking about what would happen if we got a Union; he said that everything would just be cleared from the table, and we would start from scratch. We would not have any contract; we would not have any wage rights or anything.
>
> He said it would be minimum wage, and we would work from there—no vacation pay, no holiday pay no nothing. That they would negotiate from that.

Sharpe testified on direct examination:

> [Thatcher] said that he would sit down and negotiate with us if we voted a Union in, but he didn't want a Union to come in, that we would start from scratch. And we would not have any paid holidays, not have any pay raises.
> Q. Do you recall anything else?
> A. He said that he wanted to explain the plan, and he wanted to make it a happy place to work.

On cross-examination, *Sharpe* testified:

> Q. Now, at this meeting, according to your testimony, Mr. Thatcher indicated that if the Union was voted in, he would sit down and negotiate with the Union, isn't that correct?
> A. Yes, sir.
> Q. And isn't it also true that he said that there would be no guarantee that your wages or holidays or insurance would be improved as a result of negotiations?
> A. Yes, sir.

Kennedy testified on direct examination that Thatcher said, "We were not guaranteed even what we were getting paid now—that we would have nothing, that we'd just sit down and negotiate from nothing." On cross-examination she verified that on May 24, 1979, she gave an affidavit to the Board in which all she reported about Thatcher's comments was that, "He said that they tried to keep up with industry standards and gave us a raise when the rest of the industry did." She claims that her affidavit just doesn't contain everything.

Underwood recalls that Maddox made opening remarks that the employees did not need a union and he did not want them to have one. She recalls nothing else that

Maddox said and recalls only the following with respect to what Thatcher said:

> Well, he told us that if we voted a Union in, he would sit down and negotiate with us, but that we would go back from scratch—we would start from scratch in negotiations. And I said, Mr. Thatcher, what do you mean by starting from scratch?
>
> And he said he would go back like the day we were hired in, we would not have any paid holidays or any vacation or any pay raises—that we would go back and start from scratch and negotiate from there, and there would be no guarantee that we would even be making the amount of money that we were now making.

Thatcher remembered that the meeting where the above employees were present lasted about 45 minutes and he started it by making a speech adhering to prepared notes.[44] After the speech he opened the session up for questions. He testified that the only statement he made about negotiations was that if Respondent negotiated it would do is utmost to negotiate a contract which would protect management's interest in properly running the plant. He does not recall that Underwood asked what would happen if the Union won the election, and states that most of the employees' questions were complaints about supervisor Frank Lowery. The arguably relevant portions of Thatcher's notes read as follows:

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44. He used the same notes at the 12 or 13 meetings he addressed that day. There is no contention or evidence he made any unlawful remarks at any other meeting.

III Our position on the Union

A. The question at Boaz is not whether unions are good or bad but whether you need one.

—It costs money to belong to a union, so you don't get one unless you need it.

B. I think the Company has done everything it can to make this plant the kind of place people should enjoy working in.

—It is one of the highest paid plants in the Company.

—All hourly jobs at Boaz have a guaranteed day rate. There are no incentive jobs. This is what you said you wanted. That is not the way we have handled union plants in S-C-T.

—We brought the Behavioral Science people to Boaz first - to help us improve communications and efficiency.

—You are paid wages and benefits which are competitive in the textile industry - this has always been the case.

—There is nothing in wages or benefits that the Union has been able to get out of negotiations with S-C-T that you have not gotten without a union at least as quick.

—If a company is doing all it can do—or all it is willing to do - there is no reason to pay a union to represent you. I believe S-C-T is doing all it can do at this time and remain competitive, and I am not going to

let any union make us noncompetitive. That could cost all of us our jobs.

—I am sure you have individual problems at Boaz from time to time. There are always those days your supervisor doesn't act just the way you want him to. But we must recognize that supervisors are human beings, and they have bad days just like we do - whether there is a union in the plant or not.

—I don't think unions help improve relations between the supervisors and the employee. They make them more difficult by adding a third party to the discussion. The third party, who is either a union steward from the plant or a paid professional union organizer, always thinks it is their job to cause dissension. Look around this plant - you know who the union stewards would be. Do you want them speaking for you?

—I think the facts show that you have been heard more and better by the management of this Company at Boaz without a union than the employees at Guntersville and Chattanooga have with a union.

IV Our experiences with this Union

A. This Company's past experiences with this Union have not been pleasant ones.

—The two things that stand out most in our relationship with the Union are: (1) the bitter strikes and (2) the long, drawn out negotiations in which the Union has always come out on the short end of the stick.

—Chattanooga and Guntersville employees got their wage increases in 1977 and 1978 after you did. For example, in 1977 Guntersville got their increase 13 weeks after you did. Also, no Guntersville or Chattanooga employees got any increase in February 1978, like you did. You have had three increases since early 1977, whereas Union employees in this Company have had only two. And the average wage at Boaz today is substantially higher than at Guntersville.

—There have been two strikes at Guntersville and two strikes at Chattanooga. The 1978 strike in Chattanooga was the most bitter strike I have ever witnessed. It was like something out of the early 1930's. There were Union goons on the picket line with clubs and knives and that sort of thing. Many people were injured. Twenty-three employees were fired for misconduct. For all of the damage that was done, the Union got nothing out of the strike. They got the same wage increase you did - only much later.

Maddox testified that the meeting lasted about 30 to 45 minutes and the general topic of employee discussion was complaints by Kennedy and Underwood about Frank Lowery. In response to leading questions, he denied that Thatcher said negotiations would start from scratch or that employees would lose benefits if the Union got in. He recalls no questions by Underwood concerning the Union.

I am satisfied that Thatcher did not merely read his notes verbatim, but made comments relating thereto and

answered employee questions. An examination of the employees' testimony, making allowances for normal differences which often arise when several people hear the same thing but put different interpretations on it and become convinced that their perceptions are what was in fact said, persuades me that Thatcher did advise the employees that negotiations would start from scratch, there would be no guarantees that present benefits would remain the same and they would all be subject to negotiations. Underwood's testimony most probably makes the closest approach to what was said in this regard by Thatcher, but I find it was colored by her subjective conclusions.

There is no showing Thatcher's notes contained untruths, and I find, assuming *arguendo* that he did in fact read them aloud, that they contain no threats, improper promises, or proven material misrepresentations. I do not agree with General Counsel that Thatcher's comments about the bargainability of benefits were either threats of loss of benefits or clearly intended to convey to employees the futility of union support. I find that the thrust of these comments was that the selection of the Union would not necessarily mean increases in wages or other benefits and that all wages and benefits were subject to bargaining. Such advice is not in violation of the Act.

The opening remarks by Maddox, related by Underwood, are protected free speech under Section 8(c) of the Act.[45]

7. Conduct of Mark Maddox, Industrial Relations Manager

On May 14, Maddox met with a group of about 10 employees in the plant laboratory where he put on a

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45. *Coach and Equipment Sales Corp.*, 228 NLRB 440, 441 (1977).

slide presentation with accompanying taped narrative. The slides were in major part quotations from cases decided by the Supreme Court and the Board. I credit Maddox that there was no slide of a blank piece of paper. The narrative outlines the law on the duty to bargain and arrives at the following conclusion on this subject:

> So, it is easy to see that voting for a union does not
>
> —guarantees that your wages, benefits or working conditions will be better than they are today;
>
> —in fact, there is no guarantee that through good faith bargaining your wages, benefits and working conditions will even remain the same as they are today. When you sit down to negotiate with a union, you start off with a blank piece of paper and you don't write anything down on the paper until both parties agree.

The only evidence proffered by General Counsel to support the allegation that Maddox threatened employees with loss of benefits if they selected the Union is the testimony of Melinda Kennedy. Kennedy, a somewhat confused witness, testified that during one meeting there was talk about having a union and a blank piece of paper appeared on the screen while employees were told, "When we sit down to negotiate, you know, we would start from scratch. We wouldn't have anything that he had had before." She altered this testimony on cross-examination to reflect that employees were told *in haec verba* that when negotiations commenced "there was no guarantee that we would even be making what we had now, or even have at all what we have now."

I conclude that Kennedy's testimony is a paraphrase of the narrative excerpt set forth above, that there was no

slide shown of a blank piece of paper, and that Respondent did not violate Section 8(a)(1) of the Act, by either its slide presentation or accompanying narratives.

Interrogation by Respondent's Counsel

The hearing was in recess from January 10, 1980 to February 5, 1980. On February 7, General Counsel amended the complaint to allege that Respondent's counsel, Martha C. Perrin, unlawfully interrogated two employees on January 28, 1980. The employees were Jeff Tillman and Willis Langston.

Perrin credibly testified that she questioned employees on January 2, 3 and 28, about 70 to 75 in all. She stationed herself in the first-aid room and no one else was present during her meetings with individual employees. Her procedure was to introduce herself as an attorney for the Respondent preparing for trial who would only speak to them regarding authorization cards. She routinely advised that the employee did not have to speak with her and read a prepared statement as follows:

> My name is Martha Perrin and I am an attorney for Standard-Coosa-Thatcher. My purpose in talking with you is to help the company prepare for the unfair labor practice hearing which will begin next week. I have prepared a list of questions to ask you in regard to the blue union authorization cards.
>
> I want you to understand that this interview is strictly voluntary on your part. If you do not wish to talk with me you are free to go, either now or at anytime during the interview. No reprisal or any other action will be taken against you by me or the company because of your talking with me, your refusal to talk with me or because of anything that might be said during the interview.

If you agree to talk with me under these conditions, please sign below:

> The above statement has been read to me; I understand that this interview is voluntary; and I am agreeable to this interview
>
> .....

Approximately 50 or 55 employees interviewed signed this statement. Of the remainder some refused to talk to her, others agreed that they understood the statement and talked with her but refused to sign the statement. The General Counsel does not allege that anyone other than Tillman and Langston were unlawfully questioned, and I find that the above statement incorporates safeguards endorsed by the Board as appropriate for the conduct of such interviews.[46]

I credit Perrin that she interviewed Tillman on January 2 or 3, rather than January 28 as Tillman testified. She was the more believable witness in terms of demeanor, and I found her testimony more convincing in context than that of Tillman. Further, Tillman's timecard shows that he was not at work during the hours from 11 p.m., January 28 to 7 a.m., January 29 when Perrin conducted the employee interviews. Crediting Perrin as I do, I find that the interview with Tillman opened with her self-introduction and explanation that she was only inquiring about the cards. She then advised him he did not have to talk to her, and read the above prepared statement aloud. Tillman expressed his understanding that his presence was voluntary, but declined to sign the statement. Perrin inquired further as to whether or not he

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46. See *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770, 775 (1964).

understood what he had read. Satisfied that he did, she noted, after Tillman left, on a copy of the statement that Tillman would not sign but had said he understood. She asked him if he had signed an authorization card. He first answered he had not, but then amended his answer to say that he had but later torn the card up.[47] He expanded that he had torn it up because a supervisor had seen him and he wanted no one to know he had signed one. It does not appear anything further was said. Tillman characterizes the talk with Perrin as a friendly conversation.

Perrin talked to Willis Langston on January 28.[48] Perrin expressed concern about Langston's injured arm, and introduced herself as Respondent's lawyer. She then mentioned that she recently had to have her cat treated by a doctor. The testimony of Langston and Perrin differs as to what was then said and done.

Langston states that Perrin told him she had a picture of a card he had signed and asked if he had signed it or if it was his signature. She showed it to him, and he verified that it was his signature. Perrin then advised him Bobby Joe King had turned the card in, and inquired if King had told Langston what he was signing. Langston answered that King didn't have to because he read it and knew what he was signing. At this point, Perrin told him that would be all, and expressed a hope his arm would be alright. Langston denies that Perrin read anything to him, or told him he did not have to talk to

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47. These statements to Perrin were admittedly untrue.

48. Although Perrin was earlier told by a supervisor, during the January 2 and 3 interviews, that Langston had refused to talk to her, Langston denies this. Apart from Perrin's hearsay testimony on the matter there is no probative evidence to refute Langston's denial, and I credit him on this point.

her or that no reprisals would be taken against him for anything he talked about.

Perrin's version is that she explained she was only there to inquire about authorization cards in preparation for trial, and that she would like to talk to him about a card with his signature on it that had been introduced in evidence by Bobby Joe King. A copy of that card was lying in front of her. She continues that Langston then responded that he had signed a union card, whereupon she thanked him, and he left with her last words being a statement of concern that his arm improved.

As I observed Perrin and Langston, it was my distinct impression that both were testifying truthfully to the best of their respective recollections. I consider any variance between their versions to be due to normal frailties of memory about a conversation which neither had any reason at the time to consider important enough to carefully commit to memory verbatim for future retrieval. I am persuaded that their testimony is complementary rather than contradictory, and find that the following summary is a fair and reasonable resumé of what most probably occurred during this meeting: Perrin advised that she was the Respondent's lawyer there to inquire about authorization cards in preparation for trial, and wanted to know whether Langston had signed a card which King had introduced in evidence and what King had said was its purpose. The card was in front of Perrin and Langston promptly stated he had signed it, had read it, knew what he was signing, and there had been no need for King to explain it. She thanked Langston and told him that would be all, expressing concern about his arm as he left. I am satisfied Perrin neither read the prepared statement to Langston nor orally recited the safeguards therein.

With respect to the Tillman conversation, I find that Perrin carefully observed the Board approved safeguards applicable, properly advised Tillman of his rights, limited her interrogation to reasonable and necessary inquiry solely designed to assist in the presentation of Respondent's defense at trial, and did not violate Section 8(a)(1) of the Act.

The only real issue to the Langston incident is whether or not Perrin's failure to assure him there would be no reprisals rendered her inquiry violative of the Act. A strict application of the *Johnnie's Poultry Co.*[49] standards would appear to require a finding of a violation. I am not, however, convinced that either the Board or the courts intended the standards to be mechanically applied in every case without resort to reason in the light of the surrounding circumstances. Here we have a situation where, so far as the record shows, Perrin properly advised every one of 70 or so employees interviewed with the single exception of Langston. Whether Perrin was prevented from advising Langston in accordance with the *Johnnie's Poultry* rules by the rapidity of his response to her initial statement of purpose or by inadvertence is speculative. I believe, however, that a fair inference may be drawn that the content of the meetings was widely known among the employees. The trial itself most certainly had to be a topic of conversation among them, and it is probable there was an exchange of experiences among those interviewed by Perrin. I am of the opinion that Langston was most likely forewarned about the content of the interviews. I do not suggest that this hearsay knowledge was equivalent to direct communication from Perrin, but I do suggest that the circumstances herein,

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49. 146 NLRB 770, 775 (1964).

where 70 people are interviewed and all but one appropriately reassured, support an inference that Langston was not totally unaware of what Perrin's purpose and procedure was before he entered the room.

The purpose of the *Johnnie's Poultry* safeguards is not to penalize attorneys for legitimate pretrial preparation, but to "minimize the coercive impact" of the questioning involved in such preparation. Perrin's announcement to Langston that his card was in evidence via the testimony of King truthfully advised Langston of what was public information with respect to his card, and her request for his verification was legitimate trial preparation. I am convinced that the coercive impact of Perrin's questions was minimal, if any, and that no violation should be found just because Perrin varied her uniform practice one time out of seventy. The evidence warrants no inference that the variance was either planned or unlawfully motivated.

D. *Alleged Violations of Section 8(a)(3) of the Act*

1. The Rule against Leaving the Department

The Respondent has a work rule prohibiting "Unauthorized absence from your work area or the Plant" which was in effect at least as early as April 1, 1978. Inasmuch as this rule was promulgated considerably more than 6 months before the filing of the first charge in the instant case, said promulgation may not be found to be a violation of the Act.

The real issue is whether or not the rule was enforced in a manner designated to discourage union activity among Respondent's employees. Evidence that the Respondent

had utilized this rule in such a fashion during a earlier union campaign is found in Donna McWhorter's credible testimony that in November 1977[50] Plant Manager Bowman stopped her as she was going to visit another employee, asked if she had permission to leave her department, and told her that it looked bad for her to be roaming around because Respondent was trying to stop union adherents from roaming around because they were getting union authorization cards signed. He also advised her that she should tell anyone who asked that he had "gotten on" her for going to the other plant.

There is no evidence that anyone was warned for violating this rule between the time of Bowman's statements to McWhorter and December 11, 1978, when Barbara Lemons and Glenda Finley were given warnings for leaving the mill without permission. The next warning in evidence was issued to employee Talley on February 2, 1979, for leaving the job too long.

I credit Patricia Whisenant that Supervisor "Butch" Harris gave her a written verbal warning in March 1979 against leaving the department, and told her that although she had done nothing as yet, the warning was to insure that she could not claim she had not been warned. Whisenant credibly testified that employees had previously been allowed to come and go from the department unhindered and that Harris said there was a new company rule on leaving the department.

Bobby Joe King and Patricia King credibly testified that Supervisor Bill King, who did not testify, told them

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50. I conclude November 1977 is most probably the date of this occurrence because this was the first time McWhorter had seen Bowman, and he testified that he had come to the plant about 2 years and 3 months prior to his February 5, 1980 testimony.

(Bobby Joe in February 1979 and Patricia in March 1979) that they could no longer leave their department without permission except to go to the bathroom or breakroom, a clear change from the practice then existing of leaving the department without permission and without discipline therefor.

Gloria Stanfield was issued a written verbal warning for being out of her department on May 4, 1979.

Dennis Williams was issued written warnings on March 29 and April 9, 1979, for, *inter alia*, leaving his department without permission.

I am persuaded by the evidence before me that the rule was honored in the breach between union campaigns. Between November 1977, 1 month before a Board-conducted election, and February 9, 1979, the date the present union campaign began, the only proven warnings given for infractions of the rule were December 11, 1978 and February 2, 1979. It is highly improbable that all 147 employees religiously abided by the rule during this 13-month period, and there is credible employee testimony that they did not. Bill King's advice to Bobby Joe King and Patricia King that they could no longer leave without permission signaled a change to more rigid enforcement, and Harris' prospective warning to Whisenant emphasized a new insistence on strict compliance with the rule. No persuasive reason was proffered for this more stringent policing of rule violations, and the reasons for the 1977 enforcement stated by Bowman to McWhorter, combined with the timing of the statements of Bill King and Harris shortly after the commencement of the new campaign, leads me to the conclusion that the emphasis on enforcement after the campaign started was prompted by the new campaign and was designed, as in 1977, to impede the acquisition of signed authorization cards. Respon-

dent's argument that the rule was enforced against both pro and antiunion employees is not convincing because, even if this be true, the mere fact that enforcement designed to forestall union activities fell equally on all employees would not make such unlawfully motivated enforcement lawful. In point of fact, such blanket enforcement would be the most effective way to short-circuit all such union activities. On the evidence before me, I conclude and find that the policy of rigid enforcement of the rule was instituted in 1979, as in 1977, to combat union activities and therefore violated Section 8(a)(3) and (1) of the Act.

2. The Reprimands and Discharge of Dennis Williams

The plant rules provide that infractions thereof, including the rule on "unauthorized absence from your work area or the Plant" discussed above, "will result in disciplinary action ranging from verbal warning to immediate discharge, depending upon the type of violation and the circumstances surrounding the offense." Respondent's "corrective action" manual requires discharge upon receipt of a fourth warning slip.

Williams received such warnings on March 29, April 9, April 24, and May 7, 1979, and was terminated on May 7 on the ground he had received four warnings. These warnings read as follows:

March 29, 1979:	"Leaving department without permision (sic). left Mill no. 2 went to Mill no. 1 was talking to Spinner on her job"
April 9, 1979	"Leaving his department without permission. leaving twister unattended."

April 25, 1979	"Did not clean his twister like he was asked to. Did not punched (sic) out his time card two days. on outside of building (sic) before Seven o'clock AM. did not pick up his Dr. Pepper can and papper (sic)
May 7, 1979	Failure to follow instructions (did not punch out time card two times during week ending 5/5/79)"

Inasmuch as the March 29 and April 9 warnings were based on violations of the "unauthorized absence" rule which I have found was enforced for unlawful reasons, it necessarily follows that these warnings were violative of Section 8(a)(3) and (1). Moreover, Lowery's account of the alleged violations is not convincing. With regard to the March 29 warning, Supervisor Lowery states that he observed Williams away from his department and talking to working employee Copeland for 5 to 10 minutes before Lowery terminated the conversation. This implies that either Lowery was not overly concerned about the time so spent, or that he deliberately permitted the conversation to continue in order to build sufficient cause for the warning later issued. Neither alternative affords the Respondent support for any contention that the absence of Williams from his work was of vital concern. In any event, I do not believe it likely that Lowery would merely stand and observe a 5 to 10-minute conversation on company time by an on-duty employee out of his department without earlier breaking it up. I find it far more probable that Williams only stopped for a brief moment, as he testified, before Lowery called him to the office. I further credit Williams' account of what transpired in the office over that of Lowery who recalls

nothing of what Williams said.[51] In the office, Lowery told Williams he would have to write him up for being out of his department. Williams told Lowery that he had been on his way to get cones for his machine, and asked if it was alright for him to speak to his brother from time to time for a few minutes because their mother had been operated on. Lowery gave him permission to so do as long as it was within reason.

Lowery's self-professed conduct on April 9 was even more interesting. He avers that he watched Williams talking to his brother and leading union adherent Betty Underwood, away from Williams' department, for about 5 minutes, and then left to find another supervisor, Buford Centers, whom he asked to wait in the supervisors' office, then returned and watched the conversation for another 5 minutes. Lowery did nothing to interrupt the conversation, but later called Williams to his office and issued him the warning. I do not believe Lowery and credit Williams that he only stopped for 3 or 4 minutes to converse, returned to work, and was called in by Lowery and issued his second warning. It would seem that Williams' conversation with his brother was within the ambit of Lowery's earlier permission, and the fact that his brother was talking to Underwood when he came up to them did not work to void that permission, unless, as is quite likely, Lowery was opposed to Williams consorting with known union adherent Underwood. Indeed, the whole purpose of Respondent's enforcement of the rule was to halt such contacts.

The evidence preponderates that Williams did in fact commit the infractions for which he received the April 25

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51. I also note that the failure of Respondent to call Centers, a witness to the first three warnings, warrants an adverse inference.

warning. However, the failure to investigate Williams' credible claim that Ray Hollis had been outside the plant with Williams or to take any remedial action against Hollis indicates an effort to enforce plant rules strictly against Williams while ignoring the conduct of Hollis. Hollis did not sign a union card, but Williams had signed one on February 8 and credibly testified that he told Lowery, some 2 weeks before his discharge, that he was for the Union. Two weeks before May 7 would approximately coincide with the April 25 warning. The disparate treatment of Williams and Hollis suggests an effort to concentrate on Williams without regard to other employees' conduct. In the absence of good reason for the disparate application of the rule, I am persuaded the warning was given in continuation of Respondent's efforts to discourage Williams' union activity.

Williams did not punch his timecard twice during the week ending May 5, 1979, and the fourth warning was therefore for colorable cause, but, it takes on an unlawful color from the context of other unlawful warnings within which it was given.

Respondent's hostility to union activities is abundantly shown by its other violations of the Act heretofore found. It was made explicitly aware of Williams' prounion attitude in mid- to late April, and could have reasonably inferred the direction of his sympathies from Lowery's observation of his association with known union adherent Underwood on April 9. Respondent's reliance on many rather minor infractions to support the last two warnings, except for Williams being outside the building which loses force by virtue of Respondent's failure to act against Hollis who apparently was not a union supporter, indicates a straining to terminate Williams. Respondent's efforts, via the testimony of employees Wrenn and Hilley, to show

that Williams suddenly became an unsatisfactory employee were not convincing. Although Wrenn traced his deterioration in terms of absences from the department to 3 months before his discharge, Hilley pegged it at about 14 to 15 months before his discharge. Hilley is probably correct to the extent that Williams credibly testified that prior to his first warning he regularly left as he pleased without hindrance. My conclusion that the rule against leaving the work area was not enforced except during union campaigns confirms the testimony of Williams and Hilley in this regard.

In sum, I find that the first two warnings were given pursuant to a policy of discouraging union activity, and were therefore unlawful. But for these unlawful warnings, Williams would not have been discharged and the discharge was therefore violative of Section 8(a)(3) and (1) of the Act as a product of rule enforcement designed to discourage union activity. Moreover, the Respondent, by its agent Lowery, attempted to expand on the events giving rise to the first two warnings and treated union adherent Williams differently than nonunion employee Hollis when they were absent from the plant together. I conclude the third warning was given to accelerate the departure of Williams and the fourth to complete it. The General Counsel has set forth a *prima facie* case, which Respondent has not convincingly rebutted, that the entire sequence of warnings was consciously designed to remove a union adherent from the payroll. Therefore all four warnings and the discharge are also unlawful for this reason.

E. The Objections[52]

The objections to election set for hearing before me in Case No. 10-RC-11707 read as follows:

1. Threats of adverse consequences of unionization, including loss of benefits: April 11, April 20, May 4-19, May 7 and May 17.

2. Institution and enforcement of stricter rules: April 10, 11, 12, 13, 17, 24 and 30.

3. Threat of adverse consequences up to and including discharge for engaging in union activity: April 3, May 2 and May 16.

8. Interrogation of employees concerning their union activity: April 19 and March 22-May 18.

9. Promise of benefit to employees to discourage union activity: March 24 and May 4.

10. Discharge of and/or refusal to re-employ employees for engaging in union activity: March 23, April 10, April 11 and April 25.

I have found certain matters alleged as objections to be unfair labor practices occurring during the critical period between the petition and the date of the election,[53] and it is well-settled that unfair labor practices constitute objectionable pre-election conduct.[54] Accordingly, I recommend the objections be sustained and the election be set aside.

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52. Objections 4, 5, 6, 7, 11, 12, 13, 14, 15 were withdrawn by the Union.

53. *Ideal Electric Co.*, 134 NLRB 1275; *Goodyear Tire and Rubber Company*, 138 NLRB 453.

54. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786 (1962).

F. The duty to bargain and the refusal to bargain

Having concluded that the election should be set aside, it is now appropriate to consider the refusal to bargain allegations.[55]

The parties have agreed to the appropriate unit of Respondent's employees set forth hereinabove, and further agree that the Union made a bargaining demand on March 21, 1979, and the Respondent has refused to bargain with the Union since that date. I have found that the Union represented a majority of Respondent's employees in the unit when it requested and was refused recognition on March 21, 1979.

Considering all of the Respondent's unfair labor practices found herein, I am convinced that those unlawful acts were aimed at discouraging employee support of the Union and thus preventing the Union from attaining majority support, or destroying any majority status the Union may have had. I find that Respondent's conduct had "the tendency to undermine [the Union's] majority strength and impede the election processes,"[56] that the continuing impact of Respondent's coercive conduct renders a fair election unlikely, and that the authorization cards signed by employees are a more reliable indication of their desire for representation. Consequently, I find and conclude, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as of March 21, the date it demanded recognition.

Upon the foregoing findings of fact and conclusions based thereon, and upon the entire record in this case, I make the following:

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55. *Irving Air Chute, Inc.*, 149 NLRB 627.

56. *Gissel Packing Co., Inc.*, 395 U.S. 575, at 614 (1969).

Conclusions of Law

1. Standard-Coosa-Thatcher, Carpet Yarn Division, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining:

> All production and maintenance employees employed by Respondent at its Boaz, Alabama, facility but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

4. At all times since February 20, 1979, and continuing to date, the Union has been the exclusive representative of all the employees within said appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By coercively interrogating employees about their union activities and those of others, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with discharge, plant closure, loss of access to management, insistence on contract terms unpalatable to employees, and other unspecified reprisals because of their union activities, Respondent violated Section 8(a)(1) of the Act.

7. By making implied promises of benefit to employees conditioned on their abandonment of the Union, Respondent violated Section 8(a)(1) of the Act.

8. By telling employees the timing of work-related warning was caused by the existence of union activity, Respondent violated Section 8(a)(1) of the Act.

9. By threatening employees with discharge because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

10. By more rigidly enforcing company work rules for the purpose of discouraging union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

11. By issuing warnings to Dennis Williams in reprisal for his union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

12. By discharging Dennis Williams for engaging in union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

13. The Respondent engaged in objectionable conduct requiring that the election conducted on May 18, 1979, in Case No. 10-RC-11707 be set aside.

14. By engaging in the above-described violations of Section 8(a)(3) and (1) of the Act for the purpose of undermining and destroying the Union's majority status, or to prevent it from attaining such status, the Respondent violated Section 8(a)(5) and (1) of the Act.

15. The violations of the Act found herein interfered with the election process, had a tendency to undermine the Union's strength, prevented the holding of a fair election, and warrant the issuance of a collective-bargaining order.

16. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

17. The Respondent did not commit any other unfair labor practices alleged in the complaint.

The Remedy

In order to remedy labor practices found herein, my recommended Order will require the Respondent to cease and desist from further violations, to post an appropriate Notice to Employees, and to offer unconditional reinstatement to Dennis Williams and make him whole for all wages lost by him as a result of his unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[57] I will also recommend that Respondent be ordered to rescind the four warnings used as grounds for the discharge of Dennis Williams and all other warnings issued to employees since February 6, 1979, the date of the inception of the union campaign, for violation of its work rule prohibiting "Unauthorized absence from your work area or the Plant," and remove all references to said warnings from its records. This is not intended to nor shall it preclude lawful, nondiscriminatory enforcement of said rule after this recommended order has been complied with. I shall further recommend that the Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining agent of the employees in the unit found appropriate herein.

I am of the opinion that the variety and seriousness of Respondent's unfair labor practices indicate a general disregard for employee statutory rights sufficient to warrant a broad order,[58] and I so recommend.

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57. See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

58. *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[59]

ORDER

Respondent, its agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization, by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(b) Refusing to recognize and bargain with the Union as the exclusive bargaining representative of all the employees in the above-described appropriate unit.

(c) Coercively interrogating employees concerning their and other employees' union activities and desires.

(d) Threatening employees with discharge, plant closure, loss of access to management, insistence on contract terms unpalatable to employees, or other unspecified reprisals because of their union activities.

(e) Making implied promises of benefit to employees conditioned on their abandonment of the Union.

(f) Telling employees that the timing of work-related warnings was caused by the existence of union activity.

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59. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(g) Threatening employees with discharge because they engage in protected concerted activity.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purpose of the Act:

(a) Upon request, recognize and bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a written, signed agreement.

(b) Offer to Dennis Williams immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make Dennis Williams whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Rescind and expunge from its records all references to the four warnings issued Dennis Williams and all other warnings issued to employees on and after February 6, 1979, for violation of its work rule prohibiting "Unauthorized absence from your work area or the Plant," and advise its employees in writing that it has done so.

(d) Preserve and, upon reasonable request, make available to the Board and its agents, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay due under the terms of this recommended Order.

(e) Post at its Boaz, Alabama offices and facilities, copies of the attached notice marked "Appendix."[60] Copies of said notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized agent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that these notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director for Region 10 in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply with this Order.

Dated, Washington, D. C. July 7, 1980

/s/ Claude R. Wolfe
Claude R. Wolfe
Administrative Law Judge

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60. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE hereby notify our employees that:

WE WILL NOT discourage membership in AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their or other employees' union activities, membership, or desires.

WE WILL NOT threaten our employees with discharge, plant closure, loss of access to management, insistence on contract terms unpalatable to them, or other reprisals because of their union activities.

WE WILL NOT promise our employees benefits conditioned on their abandonment of the Union.

WE WILL NOT tell our employees that the timing of work-related warnings was caused by the existence of union activity.

WE WILL NOT threaten employees with discharge because they engage in concerted activities protected by the National Labor Relations Act.

WE WILL NOT refuse to recognize or bargain with AMALGAMATED CLOTHING AND TEXTILE

WORKERS UNION, AFL-CIO, CLC, as the exclusive representative of all employees in the bargaining unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL upon request, bargain collectively with AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody that understanding in a written, signed agreement. The bargaining unit is:

> All production and maintenance employees employed by us at our Boaz, Alabama, facility but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer to DENNIS WILLIAMS immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him.

WE WILL rescind and expunge from our records all references to the four warnings issued DENNIS WILLIAMS and all other warnings issued to employees on and after February 6, 1979, for violation of work rule 9 prohibiting unauthorized absence from

the work area or the plant. Said work rule will be fairly enforced without unlawful discrimination commencing at such time as we have complied with all the provisions of the National Labor Relations Board's Order.

All our employees are free to join AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, or any other labor organization.

Standard-Coosa-Thatcher, Carpet Yarn Division, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, Georgia 30303, Telephone No. (404) 221-2886.

No. 82-1261

In the Supreme Court of the United States

OCTOBER TERM, 1982

STANDARD-COOSA-THATCHER CARPET YARN DIVISION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's violations of the National Labor Relations Act—which included a discriminatory discharge, threats of plant closure and numerous other unfair labor practices—precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 691 F.2d 1133. The decision and order of the National Labor Relations Board (Pet. App. A28-A107) are reported at 257 N.L.R.B. 304.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1982. A petition for rehearing was denied on December 23, 1982 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Upon finding that petitioner had committed a "plethora of acts of interference, restraint, and coercion against employees" (Pet. App. A32), including actions that would tend to destroy fair election conditions for a longer period of time than other unfair labor practices (*id.* at A32 n.7), the Board issued a bargaining order on the basis of authorization cards. Petitioner, while not disputing the Board's unfair labor practice findings, contends that the Board failed to offer an adequate explanation for its choice of remedies.

1. In February 1979,[1] the Amalgamated Clothing and Textile Workers Union, AFL-CIO ("the Union"), at the instance of several of petitioner's employees, began an organizing campaign among the employees at petitioner's Boaz, Alabama, plant (Pet. App. A2, A42). By February 20, 74 of petitioner's 147 employees had signed union authorization cards; by March 17, 13 more employees had signed cards (*id.* at A53 n.20). The Union then petitioned for a Board election and requested recognition from petitioner as the employees' exclusive bargaining representative. Petitioner refused to bargain with the Union (*id.* at A2, A43).

Meanwhile, shortly after the Union began its organizing activities, petitioner, through both its front-line supervisors and senior officials, embarked on a campaign of threats and coercive interrogations aimed at union supporters. On February 13, Supervisor Butch Harris summoned employee Kathy Holland to a private meeting in a locked room, interrogated her as to why she she wanted a union, and threatened that petitioner would close the plant if it went union (Pet. App. A12, A54-A55). Harris then held a similar meeting with employee Patricia Whisenant, interrogated her

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[1] All dates are in 1979, unless otherwise noted.

about the Union, threatened her with loss of access to management, and warned that petitioner "would close down the plant" in the event of unionization (*id.* at A12, A55-A56). At about the same time, Personnel Manager Ernest Bouldin told Whisenant that Holland would "get her ass fired" if she "d[id]n't watch" her involvement in the "Union business" (*id.* at A4, A63). A few weeks later, Whisenant confronted Bouldin after having been turned down for a job transfer and was told by him that he would "like her a lot better if she were on the right side" (*id.* at A4, A63-A64).

In late February, Supervisor Frank Lowery called employee Melinda Kennedy into his office, interrogated her about her union involvement, and asserted that, if the Union came in, petitioner would refuse to pay wages any higher than it currently paid (Pet. App. A10-A11, A69-A70). The next week, Lowery summoned union leader Betty Underwood to his office, issued her a verbal warning, and threatened that the existence of the union campaign would lead to unusually strict enforcement of petitioner's work rules (*id.* at A7, A71-A72).

In addition, petitioner suddenly commenced strict enforcement of a previously-dormant rule prohibiting employees from leaving their work stations without prior authorization; the evidence showed that petitioner reactivated the rule in order to prevent union supporters from getting signed authorization cards (Pet. App. A16-A19, A89-A92). On March 29 and April 9, union supporter Dennis Williams was issued warnings for minor violations of the rule; subsequently, petitioner gave Williams two more warnings for other minor infractions — warnings which would not have issued except for Williams' support of the Union. Petitioner, which had a policy of discharging employees after four formal warnings, then discharged

Williams on May 7 — 11 days before the scheduled representation election (*id.* at A19-A20, A92-A96).

On May 12, a few days after Williams' discharge, Supervisor Lowery chastized union activist Underwood for her concerted activities and added that, "if you'll notice, Dennis Williams raised hell for a couple of weeks, and he's not here any longer" (Pet. App. A6-A7, A75). At about the same time, Lowery approached employee Elizabeth Sharp, noted her friendship with Underwood, and interrogated her concerning her attitude toward the Union (*id.* at A9-A10, A73-A74). Shortly thereafter, Personnel Manager Bouldin interrogated Whisenant about her union sympathies (*id.* at A5, A66).

On May 18, the day of the election, Plant Superintendent Jack Bowman told union supporter Holland that petitioner had already decided that, if the Union won, petitioner would insist on certain contractual provisions that would not benefit the employees (Pet. App. A3-A4, A68-A69). The Union lost the election by a vote of 67 to 74 (*id.* at A2, A43). Three days later, Supervisor Harris berated Whisenant for the union supporters' decision to take the representation matter "to court," stating, "you're not satisfied getting in as deep as you have. You just go on and get in deeper and deeper" (*id.* at A13, A58).

The Union filed objections to the election and unfair labor practice charges with the Board, and the Board issued a complaint on the charges (Pet. App. A39, A43). Several months later, while preparing for the unfair labor practices hearing, one of petitioner's attorneys interrogated employee Willis Langston about his signed authorization card without advising Langston that he was free to decline to discuss the matter and that there would be no reprisal against him for anything he said concerning the matter (*id.* at A29-A31, A84-A87).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by threatening employees with plant closure, loss of access to management, discharge, bargaining intransigence, and other reprisals; by issuing retaliatory disciplinary warnings; by coercively interrogating employees; and by promising benefits (Pet. App. A29-A31, A99-A100). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by enforcing a previously dormant disciplinary rule, by issuing formal warnings to employees who violated the rule, and by discharging employee Williams because of his support for the Union (Pet. App. A100).

The Board also accepted the Administrative Law Judge's findings that petitioner's "conduct had 'the tendency to undermine [the Union's] majority strength and impede the election processes;' that the continuing impact of [petitioner's] coercive conduct renders a fair election unlikely, and that the authorization cards signed by [a majority of the unit] employees are a more reliable indication of their desire for representation" (Pet. App. A31, A98, quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969)). Accordingly, the Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union (Pet. App. A31, A98). The Board explained that it reached this conclusion because "the serious and extensive unlawful activities by [petitioner] commenced immediately after the Union began its organization drive and continued unabated right up to the election and even after the election" (*id.* at A32). The Board noted that, during the three-month period between the advent of the Union and the election, petitioner violated Section 8(a)(1) of the Act by numerous instances of interrogation of employees about union activities, as well as by numerous threats of reprisals against employees because of their union

activities. The latter included the threat of plant closure, which "is among the most effective unfair labor practices for destroying election conditions for a longer period of time than other unfair labor practices" (Pet. App. A32 n.7). Petitioner further violated Section 8(a)(1) by making implied promises of benefits if employees would abandon the Union and threatening stricter enforcement of rules so long as the Union was on the scene. The Section 8(a)(1) violations continued even after the election, when petitioner threatened retaliation against an employee for continued union activity and engaged in another coercive interrogation (Pet. App. A32). Finally, the Board noted that petitioner violated Section 8(a)(3) of the Act by more "rigidly enforcing company work rules for the purpose of discouraging union activities," a policy which "contributed directly to the discriminatory discharge of union adherent Dennis Williams" and which was "the most effective way to short-circuit all * * * union activities" (Pet. App. A32-A33).

3. The court of appeals, with one judge dissenting, upheld the Board's decision and enforced its order (Pet. App. A1-A26).[2] The court held (*id.* at A22) that the bargaining order was "well within the Board's discretion" under the standards established in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). The court explained that (Pet. App. A22-A23):

> The Company responded to the Union's most recent campaign with threats of plant closure, threats of retaliation against Union activists, and discriminatory discipline aimed at thwarting unionization. As is widely

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[2]The court of appeals found, contrary to the Board, that one instance of interrogation by Supervisor Lowery was not coercive (Pet. App. A11). The court noted, however, that its rejection of that single finding had no impact on the propriety of the Board's remedial order (Pet. App. A23).

> recognized, such conduct tends "to have a lasting inhibitive effect" on employees' formulation and expression of free choice regarding unionization. NLRB v. Jamaica Towing, Inc., 632 F.2d [208,] 213 [2d Cir. 1980].

The court rejected petitioner's contention that the Board's rationale for issuing a bargaining order was inadequately explained. The court noted that "[i]n this case the Board discussed the particular violations involved and emphasized that 'the serious and extensive unlawful activities by [petitioner] commenced immediately after the Union began the organization drive and continued unabated right up to the election and even after the election' " (Pet. App. A22). The court concluded that "[t]his statement of reasons is sufficient to permit review * * *" (*ibid.*).

ARGUMENT

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 594 (1969), this Court sustained the Board's authority to issue bargaining orders in cases in which "serious unfair labor practices" have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." The Court approved the Board's issuance of bargaining orders not only in "exceptional" cases marked by "outrageous" unfair labor practices (Category I cases) (395 U.S. at 613-614), but also in cases where the unfair labor practices are "less pervasive," but the Board nevertheless finds "that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (Category II cases) (*id.* at 614-615). The Court also emphasized that (*id.* at 612 n.32):

> It is for the Board and not the courts * * * to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Petitioner no longer disputes the Board's unfair labor practice findings. Nor does it appear to challenge the conclusion that its unfair labor practices—which included threats and interrogations by the plant manager and personnel manager, as well as by front-line supervisors; two threats of plant closure; and the discharge of a union adherent for engaging in union activity—were the kind of serious violations which may warrant a bargaining order. Rather, petitioner contends (Pet. 6-7) that the Board's explication of the need for a bargaining order in this case does not meet the requirements of *Gissel* for the issuance of a Category II bargaining order.[3] There is no merit to petitioner's contention.

1. In concluding "that the continuing impact of [petitioner's] coercive conduct renders a fair election unlikely" (Pet. App. A31, A98), the Board carefully considered not only the extent of the unfair labor practices and their past

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[3]Petitioner does not contend that there is any conflict among the circuits over the proposition that unfair labor practices of the scope and nature involved here represent the kind of violations that constitute a *Gissel* Category II case. Indeed, the courts of appeals have consistently held that unlawful discharges and threats of plant closure are sufficient to justify a Category II bargaining order. See, *e.g.*, *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir. 1981); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981); *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1150-1151 (9th Cir. 1977); *NLRB* v. *Lou De Young's Market Basket, Inc.*, 430 F.2d 912, 915 (6th Cir. 1970).

effect on the election process, but also their continuing effect. Thus, the Board found that the Union represented a majority of petitioner's employees when it requested and was refused recognition by petitioner, and that petitioner committed "serious and extensive" violations of the Act in an antiunion campaign that "commenced immediately after the Union began its organization drive and continued unabated right up to the election and even after the election" (*id.* at A31-A32). The Board noted that not only were there "numerous" instances of coercive interrogations and unlawful threats, including plant closure, but that "the threat of plant closure is among the most effective unfair labor practices for destroying election conditions for a longer period of time than other unfair labor practices" (*id.* at A32 n.7, citing *Gissel, supra,* 395 U.S. at 611 n.31). The Board further noted that petitioner made promises of benefits conditioned on abandonment of support for the Union, threatened the employees with more rigid enforcement of work rules because of the existence of union activities, and then implemented this more rigid enforcement policy, which "contributed directly to the discriminatory discharge of union adherent Dennis Williams" (Pet. App. A32-A33). Finally, the Board noted that petitioner's unlawful activity continued even after the election (*id.* at A32).

Without doubt, these findings plainly are sufficient to meet the requirement of *Gissel* that, in a Category II situation, the Board must determine that "the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" than an election (395 U.S. at 614-615). Contrary to petitioner's apparent contention (Pet. 7), the Court in *Gissel* did not impose any rigid analytic framework on the Board; indeed the Court noted that the requisite findings

were probably implicit in the Board's decisions to issue bargaining orders (395 U.S. at 613). The Court remanded three of the four cases under review for additional findings only because both the Board and the Court discarded the Board's prior practice of requiring the Board "to phrase its findings in terms of an employer's good or bad faith doubts [concerning the union's majority status]" (395 U.S. at 616). No such extraneous findings infected the Board's decision in the instant case, and it is thus fully consistent with *Gissel*.

2. Petitioner contends (Pet. 11) that the decision here conflicts with decisions in the First, Sixth, Seventh, Ninth and Tenth Circuits.[4] But the asserted conflict among the circuits has nothing to do with the circumstances in which it is appropriate for the Board to issue bargaining orders; the governing principles were established in *Gissel*, and the courts of appeals have generally followed them. Instead, petitioner contends that the courts are in conflict over the degree of factual analysis that is required for meaningful judicial review. Upon examination, it is apparent that petitioner's assertion of a conflict reflects nothing more than the fact that in some cases the courts have criticized the Board's explanation of its decision to issue a bargaining order as being too sketchy to permit meaningful judicial review,[5]

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[4]Petitioner concedes (Pet. 10) that the court of appeals' opinion is "consistent with decisions in the Second, Third, Fifth, and Eighth Circuits."

[5]See, *e.g.*, *NLRB* v. *American Spring Bed Mfg. Co.*, 670 F.2d. 1236, 1247-1248 (1st Cir. 1982); *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1979); *NLRB* v. *Rexair, Inc.*, 646 F.2d 249, 251 (6th Cir. 1981); *NLRB* v. *Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982); *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F.2d 503, 508-511 (7th Cir. 1980); *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108, 1118-1119 (7th Cir. 1973); *NLRB* v. *Miller Trucking Service, Inc.*, 445 F.2d 927, 931-932 (10th Cir. 1971). Significantly, in many of these cases the courts refused to enforce Board bargaining orders not only because of a perceived insufficiency in the Board's stated rationale,

while in other cases the courts have found the Board's explanation sufficient (see page 10 note 4, *supra*). Significantly, all of the circuits that petitioner asserts are in conflict with the Fourth Circuit have enforced Board bargaining orders supported by findings similar to the Board's findings in this case.[6] It is thus apparent that no significant legal conflict exists; instead, the cases cited by petitioner demonstrate only that different factual circumstances will produce different results. Such an unremarkable phenomenon does not warrant this Court's review.[7]

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but because the Board's unfair labor practice findings were either set aside or found not to be of sufficient magnitude to warrant bargaining orders. See, *e.g.*, *American Spring Bed, supra*, 670 F.2d at 1248; *Pilgrim Foods, supra*, 591 F.2d at 120; *Century Moving & Storage, Inc., supra*, 683 F.2d at 1094; *Red Oaks Nursing Home, Inc., supra*, 633 F.2d at 510-511; *Peerless of America, Inc., supra*, 484 F.2d at 1120-1122.

[6]See, *e.g.*, *NLRB* v. *Hasbro Industries, Inc.*, 672 F.2d 978, 989-990 (1st Cir. 1982), enforcing 254 N.L.R.B. 587, 594-595 (1981); *NLRB* v. *Matouk Industries, Inc.*, 582 F.2d 125, 130 (1st Cir. 1978); *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664-665 (6th Cir. 1982); *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir.), enforcing 253 N.L.R.B. 1054, 1084-1085 (1981); *NLRB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 693-694 (7th Cir. 1982), enforcing 253 N.L.R.B. 5, 14 (1980); *NLRB* v. *Davis*, 642 F.2d 350, 354-356 (9th Cir. 1981), enforcing 243 N.L.R.B. 837, 845 (1979); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1152 (9th Cir. 1977), enforcing 201 N.L.R.B. 647, 657 (1973); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981), enforcing 244 N.L.R.B. 303, 315 (1979).

[7]Petitioner also asserts (Pet. 13-14) that the Fourth Circuit's decision in this case conflicts with its decisions in *NLRB* v. *Appletree Chevrolet, Inc.*, 608 F.2d 988, 998-999 (1979), on remand, 671 F.2d 838, 841 (1982), and *NLRB* v. *Maidsville Coal Co.*, No. 81-2155 (Nov. 15, 1982), rehearing en banc granted (Feb. 16, 1983). An intra-circuit conflict does not warrant review by this Court because it can, and should, be resolved by the court of appeals sitting en banc. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Indeed, the Fourth Circuit has undertaken to resolve any such conflict by granting the Board's petition for rehearing en banc in *Maidsville*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03

No. 82-1261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioner

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR RESPONDENT UNION IN OPPOSITION

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DISCUSSION

1. Petitioner seeks review of a decision of the Court of Appeals enforcing an order of the National Labor Relations Board ("the Board") requiring petitioner to bargain with respondent union. The Board entered this bargaining order to remedy a series of unfair labor practices committed by petitioner, but not identified in petitioner's Statement of the Case. (Pet. 4-5).[1] Petitioner's violations of the National Labor Relations Act ("NLRA") are, however, described in the "Statement" appearing in the Brief for the National Labor Relations Board in Opposition (pp. 2-4), and we shall not reiterate that de-

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scription or the remainder of the Board's Statement (*id.* pp. 5-7).[2]

2. Petitioner's failure to describe the misconduct on which the bargaining order is based exemplifies the abstract nature of the issue which it presents for review. Petitioner does not contend that the Board abused its discretion in entering that order; plainly the merits of such a contention would depend on the nature of the underlying unfair labor practices. Rather, petitioner objects that the Board did not adequately explain the exercise of its discretion in entering that order. That contention is utterly unworthy of this Court's consideration (cf. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491; *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503), and is, in any event, utterly without substance.

Petitioner asserts that the decision below is inconsistent with *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (*"Gissel"*) (Pet. 6-7). In the passages quoted by petitioner, this Court set forth the substantive standards which the Board must follow in determining whether a bargaining order should issue to remedy "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." (395 U.S. at 614.) At no point did the *Gissel* opinion prescribe special requirements of clarity or specificity when the Board issues a bargaining order. Thus, petitioner's assertion of a departure from *Gissel* is baseless.

The standards of clarity and specificity to which bargaining orders are subject derive not from *Gissel*, but from well-established principles of administrative law which apply to all Board remedial orders, entered pursuant to § 10(c) and judicially reviewable under §§ 10(e) and (f) of the National Labor Relations Act ("NLRA").

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[2] The Board's unfair labor practice findings were approved by the Court of Appeals (Pet. A 3-A 20) and are not challenged here.

The leading case is *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177:

> The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board. [313 U.S. at 197] [3]

In this case the Board's discussion of its choice of a bargaining order as a remedy covers more than two pages of its Decision as reproduced in the Appendix to the Petition (Pet. A 31-A 33). The Board approved the Administrative Law Judge's finding that:

> "Respondent's conduct had 'the tendency to undermine [the Union's] majority strength and impede the election processes,' that the continuing impact of Respondent's coercive conduct renders a fair elec-

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[3] See also *SEC v. Chenery Corp.*, 318 U.S. 80, where, after quoting from his opinion for the Court in *Phelps Dodge, supra*, Justice Frankfurter continued:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commision must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained. [318 U.S. at 95.]

> tion unlikely, and that the authorization cards signed by employees are a more reliable indication of their desire for representation." [Pet. A 31, quoting Pet. A 98, which had quoted *Gissel*, 395 U.S. at 614]

The Board also described the unfair labor practices and their impact on the employees' freedom of choice (Pet. A 31-A 33). It therefore concluded that "the respondent's unlawful activities warrant a bargaining order under *Gissel*" (Pet. A 33).

"All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." (*Phelps Dodge, supra*, 313 U.S. at 197). No one who reads the Board's decision in this case can fairly deny that it has complied with this requirement.[4]

3. Petitioners assert that the decision below (and those of other Courts of Appeals) "are directly inconsistent with decisions in the First, Sixth, Seventh, Ninth and Tenth Circuits, which have interpreted *Gissel* as requiring the Board to analyze and articulate the appropriateness of a bargaining order." (Pet. 11) But in this case the Board *did* "analyze and articulate the appropriateness of a bargaining order (*id.*) And the Court of Appeals, far from giving "perfunctory deference to the Board's choice of remedies in the instant case" (Pet. 7), carefully examined the Board's decision (Pet. A 21-A 22) and satisfied itself that the Board's "statement of reasons is sufficient to permit review and hence withstands the

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[4] The thoroughness of the Board's analysis of the remedial issue in this case contrasts favorably with that which was unsuccessfully challenged in *Shepard v. NLRB*, —— U.S. ——, 51 U.S.L.W. 4087, decided January 18, 1983. The Board's "explanatory paragraph" of the exercise of its remedial discretion in that case struck the Court "as something less than a model of precise expository prose" (Slip Op. pp. 5-6, 51 U.S.L.W. at 4089. Nevertheless, applying *Phelps Dodge, supra*, this Court affirmed the Board's decision, because it could divine "the sense of the Board's explanation" and the Board's conclusion "was justifiable" (Slip Op. p. 6, 51 U.S.L.W. at 4089).

Company's procedural challenge." (Pet. A 22)[5] Petitioner's claim of an intercircuit conflict proceeds from a wholly inaccurate characterization of the decision below.

To be sure, petitioner is able to point to some decisions of some courts of appeals in which a bargaining order was reversed. In certain of these the court of appeals had also reversed some of the unfair labor practice findings on which the Board had based its bargaining order. In others, it appears that the court of appeals did, contrary to this Court's teachings, "stick in the bark of words" (*SEC v. Chenery Corp.*, 318 U.S. at 89, quoted at p. 3, n.3, *supra*). But even if a conflict of decisions for purposes of this Court's Rule 17 could be established by a "color-matching of cases" (cf. *Reck v. Pate*, 367 U.S. 433, 442), we are aware of no case in which a bargaining order was denied enforcement where the underlying unfair labor practice findings (including a threat to close the plant, Pet. A 32, n.7) have been affirmed in full, and the Board has given as careful an explanation of the exercise of its discretion as it has provided here.

[5] The Court also concluded that "the order also comports with the applicable evidentiary and substantive standards and lies well within the Board's discretion." (Pet. A 22) Petitioner does not seek review of that determination.

CONCLUSION

For the foregoing reasons and those stated in the Brief for the National Labor Relations Board in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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